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**REPORTS**  
**OF**  
**Cases Argued and Determined**  
**IN**  
**Circuit and Appeals Courts**  
**of Ohio**

**Selected and Reported**  
**By W. J. TOSSELL**  
**Editor of**  
***The Ohio Law Bulletin***

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# JUDGES OF THE COURTS OF APPEALS OF OHIO

From 1916 to 1917

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Phil M. Crow, Secretary, Kenton.

## FIRST DISTRICT

Edward H. Jones ..... Hamilton  
Oliver B. Jones ..... Cincinnati  
Frank M. Gormley ..... Cincinnati  
\*Peter F. Swing ..... Cincinnati

## SECOND DISTRICT

H. L. Ferneding ..... Dayton  
Albert H. Kunkle ..... Dayton  
James I. Allread ..... Greenville  
Charles W. Dustin ..... Dayton

## THIRD DISTRICT

Phil M. Crow ..... Kenton  
T. T. Ansberry ..... Defiance  
Walter H. Kinder ..... Findlay

## FOURTH DISTRICT

E. D. Sayre ..... Athens  
M. F. Merryman ..... Gallipolis  
Festus Walters ..... Circleville

## FIFTH DISTRICT

Robert S. Shields ..... Canton  
Louis K. Powell ..... Mt. Gilead  
Louis B. Houck ..... Mt. Vernon  
\*Richard M. Voorhees ..... Mansfield

## SIXTH DISTRICT

Silas S. Richards ..... Clyde  
Charles E. Chittenden ..... Toledo  
Reynolds R. Kinkade ..... Toledo

\*Former Judges sitting in courts designated, decisions of whom  
are reported in this volume.

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SEVENTH DISTRICT

W. H. Spence ..... Lisbon  
John Pollock ..... St. Clairsville  
Willis S. Metcalfe ..... Chardon  
\*Caleb H. Norris ..... Youngstown

EIGHTH DISTRICT

Walter D. Meals ..... Cleveland  
C. R. Grant ..... Akron  
A. G. Carpenter ..... Cleveland  
\*Frederick A. Henry ..... Cleveland  
\*Ulysses L. Marvin ..... Akron  
\*Louis H. Winch ..... Cleveland

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\*Former Judges sitting in courts designated, decisions of whom are reported in this volume.

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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**CIRCUIT COURTS OF OHIO**

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**STREET RAILWAYS.**

[Delaware (5th) Court of Appeals, May Term, 1915.]

Houck, Shields and Powell, JJ.

**ELI M. WEST, RECEIVER V. WALTER H. GILLETTE, ADMR.**

- 1. Presumption of Control of Street Car at Street Intersection on Slippery Track and Down Grade.**

One approaching street car tracks at a street intersection, driving a horse and carriage, seeing a street car at the summit of a steep grade, more than 300 feet distant, and having been first at the crossing, might properly rely upon the presumption that the car was traveling at proper speed when running down grade and under control; or if such driver were negligent in driving upon such crossing at the time and under the circumstances stated, the motorman, plainly seeing the horse and vehicle at the top of the slope and seeing the peril of the driver and his failure to heed the warnings sounded, had time, opportunity to avoid a collision by checking the speed or stopping the car and neglected to do so, the street car company would be liable for injuries so sustained, and the fact that the tracks were slippery would not excuse but demands increased vigilance, all of which being facts for the jury, a judgment for plaintiff will not be reversed.

- 2. Last Chance Doctrine Applies to Collisions between Street Cars and Vehicles at Street Intersections.**

The "last chance" doctrine applies in an action for injuries resulting from a collision between a street car and horse and vehicle at a street crossing, where plaintiff avers that when decedent reached the tracks the street car was more than 300 feet away and that the motorman had ample time after seeing the peril of decedent regardless of contributory negligence of the

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driver, to check the fast speed of the car thereby to have avoided the collision; hence an instruction given the jury upon a request by the jury for repetition thereof; that "the car must be in the power of the motorman to such an extent as that when he saw the horse and buggy on the track \* \* \* he would stop his car within a reasonable time and distance so as to avoid, if possible, the collision, correctly states the law, especially since there was uncontradicted proof that the vehicle and horse were in plain view of the motorman from the summit down.

3. Motion to Direct Verdict Refused If Evidence Tends to Prove Material Allegations of Pleadings.

In a negligence case, on motion to direct a verdict for nonsuit, there being evidence tending to prove the material allegations charged in the petition, the case should be submitted to the jury.

## ERROR.

*Harry F. West and Hough & Jones*, for plaintiff in error.

*Marriott, Freshwater & Wickham and George C. Snyder*, for defendant in error.

## SHIELDS, J.

This was an action brought in the court of common pleas of Delaware county, Ohio, by Albert N. Gillette's administrator to recover damages against Eli M. West, as receiver of the Columbus, Delaware & Marion Railway Company, for the death of the said Albert N. Gillette, alleged to have been caused by the negligence of the said railway company while the said Albert N. Gillette was on January 11, 1913, driving his horse attached to a buggy upon and over the crossing of Olentangy avenue and Sandusky street within the corporate limits of the city of Delaware, Ohio.

The negligence charged in the plaintiff's petition filed in the court below was, in substance, that the motorman in charge of one of the interurban cars of said railway company, in operating the same between the said city of Delaware and the city of Columbus, Ohio, in the afternoon of said day, when approaching said crossing at down grade from the summit of an elevation some 300 feet distant therefrom, and when in full view of the said Albert N. Gillette while driving on said Olentangy avenue up to and upon said crossing and in an effort to

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cross the same, carelessly, negligently and unlawfully run said car at a high, reckless and dangerous rate of speed in utter disregard of the rights of the said Albert N. Gillette upon said crossing, without giving warning by whistle or otherwise of the approach of said car to said crossing, which said car struck the horse and carriage of the said Albert N. Gillette, with great force and violence when upon said crossing, throwing him out of said carriage upon the ground, causing concussion of the brain and great internal injuries, from the effects of which he died. Other averments of negligence in connection with the killing of the said Albert N. Gillette at said time and place were contained in said petition, which appear in the discussion of the facts in this opinion. Damages in the sum of \$10,000 were prayed for.

In his answer to said petition said receiver admits that the said Albert N. Gillette collided with one of the cars operated by the defendant as receiver, at the time and place stated, and that he died shortly thereafter, but denies all the other allegations of said petition. He further avers that if upon the trial it should appear that the defendant was guilty of negligence as charged in said petition, that the decedent was guilty of negligence directly contributing to his injury and death, in that he started to cross the tracks of the defendant at the point of the collision without first exercising care to discover the approach of the car of the defendant.

For reply to the second defense in said answer the plaintiff denied all the allegations therein charging negligence directly contributing to the injury of the said decedent.

Trial was had upon the issues thus made resulting in a verdict and judgment for the plaintiff. A petition in error with a bill of exceptions containing the evidence taken upon the trial, including the charge of the trial court to the jury, was filed in this court for a reversal of said judgment.

Numerous assignments of error are contained in said petition in error, but we will consider more particularly such as were urged upon the attention of this court and upon which the plaintiff in error relied.

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It was urged that the court below erred, in overruling the motion of the plaintiff in error for an instructed verdict in its favor at the conclusion of the evidence introduced in behalf of the plaintiff below and again renewed at the close of all the evidence in the case. We think the law is well settled in this state as to the duty of the trial court where a motion is interposed in a case to direct a verdict, or for nonsuit, the authorities holding with practical unanimity that where there is evidence tending to prove negligence of one party or the other, the case should be submitted to the jury.

In *Stockstill v. Railway*, 24 Ohio St. 83, it is held that:

"If the evidence tends to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain his action, he has a right to have the weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant the motion and render a judgment against him."

In *Dick v. Railway*, 38 Ohio St. 389, it is held that:

"A motion to arrest the testimony from the jury and render a judgment against the party on whom the burden of proof rests, involves an admission of all the facts which the evidence tends to prove, and presents only a question of law for the court; but if there is evidence tending to prove each material fact put in issue, and indispensable to a recovery, it should be submitted to the jury under proper instructions."

In *Gibbs v. Girard*, 88 Ohio St. 34 [Ann. Cas. 1914c, 1082], it is held that:

"A cause of action for damages brought against a village for negligence in the care of its sidewalks, by reason of which it is claimed plaintiff was injured, presents a jury issue if there is some evidence tending to prove every essential fact necessary to entitle plaintiff to recover; and an order of the trial judge at the close of the plaintiff's case directing a verdict in favor of defendant over the objection of such plaintiff is a denial and violation of the right of trial by jury and therefore reversible error."

And Judge Wanamaker speaking for the court in said case, on page 47, says:

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"So long as the trial by jury is a part of our system of jurisprudence its constitutional integrity and importance should be jealously safeguarded. The right of trial by jury should be as inviolate in the working of our courts as it is in the wording of our constitutions."

From the foregoing and from numerous other like decisions by the courts of this state, it will be seen that the duty of the trial court is made clear in a case on a motion to direct a verdict wherein the evidence tends to support the material allegations charged in the petition. Applying this rule of law to the facts in the case at bar, was the action of the trial court in overruling said motion within the limitations of said rule? An examination of the record shows there was no little conflict in the evidence in reference to at least some of the material facts put in issue, namely, the rate of speed at which the car in question was being operated, the gait at which the horse of the decedent was being driven, and the location of the horse and carriage at the time of the accident, all of which were material and important facts as affecting the right of recovery by the defendant in error, and in the light of the foregoing citations we are of the opinion that the action of the court below in overruling said motions was proper.

It was also urged that the verdict of the jury is clearly against the weight of the evidence, because it was contended that the decedent's death was the result of his own negligence and was not wholly due to the negligent act or acts of the motorman in charge of said car. Not unlike most cases of this character, the liability of this company here, if any, depends upon a very few controlling physical facts in the case, and the law when applied to such facts ought not to render the case difficult of solution. An examination of the evidence contained in the bill of exceptions shows that as one of the defendant's interurban cars reached the summit of the elevation north of the intersection of Olentangy avenue and Sandusky street at said crossing, a distance of about 325 feet, the motorman in charge of said car saw the decedent's horse and carriage, with the curtains on said carriage and a rain-apron fastened in front

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of the seat of said carriage, through which said apron was an opening for the handling of the lines upon said horse, approaching the tracks of said railway, on said avenue, and while in the act of crossing said railway tracks said car collided with said horse and carriage resulting in the death of said Albert N. Gillette. The motorman testified that as said car left the summit of said elevation and descended towards said crossing said horse was walking on said avenue and was about fifty feet distant from said railway tracks on said crossing, that said car was then running from eight to ten miles an hour, that upon sounding the whistle on said car and noticing that no apparent heed was being given to it, he sounded further danger warnings, and when said car was about one hundred and fifty feet from said crossing, acting upon what he assumed to be a checking or stopping of the horse "just as he was about to cross the tracks," he released the air and as said car passed over said crossing it collided with said horse and carriage. That a drizzling rain was falling on said day which rendered the surface of the tracks of said railway company wet and slippery. He further testified that he was familiar with the surroundings at said crossing, that he passed over said crossing some six times daily in making his runs to and from Columbus, that he knew there was a hedge fence on the north side of the traveled portion of said Olentangy avenue and that said crossing was known to be dangerous. That the whistle on said car was sounded substantially as claimed by the motorman does not seem to be disputed, nor is the distance that said decedent was seen to be traveling toward and near to said crossing with said horse and carriage as said car descended said hill or elevation seriously in dispute, although the testimony of the motorman in this respect is not wholly borne out by persons aboard said car as passengers, especially as to the distance of said car from said crossing when the last danger signal was given and the position of the horse and carriage at that time, the main conflict of testimony being as to the rate of speed said car traveled from the summit of said elevation to and over said crossing. Joshua Stickney, a witness for the plaintiff, who was a passenger on said car, testified,

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in substance, that when said car descended said elevation from the summit thereof to said crossing it was running twenty miles an hour or more, that there was no change in the rate of speed traveled by said car during said distance. That when said car was within seventy-five feet of said crossing there was a sharp shrill whistle blown when he jumped up from his seat, that he looked out through a window and saw the carriage about seventy-five feet from the crossing. That the horse was then jogging on a trot and when he again looked out, the carriage was then from twenty to twenty-five feet from the crossing and that it was about this time that the car seemed to strike it. Other witnesses testified in support of the contentions of both the plaintiff and defendant. The undisputed testimony was that the right hind leg of the horse was broken, that the carriage was demolished, that the body of the decedent was hurled some thirty feet from the crossing, and that he thereafter died from the injuries received in said collision. Was said verdict returned clearly against the weight of the evidence given upon the trial? The plaintiff in error vigorously contended that the evidence fully justified their contention that the decedent's death was wholly due to his own negligence in attempting to pass over said crossing without exercising that degree of care necessary to avoid danger. The rule that a party about to cross a known place of danger is called upon to exercise his senses of sight and hearing and to do everything that a prudent man would do under similar circumstances to avoid being injured, is held in *Cleveland, C. C. & I. Ry. v. Elliott*, 28 Ohio St. 340, and in numerous other authorities that might be cited to the same effect, but the last pronouncement by our Supreme Court on this subject in *Steubenville & W. Trac. Co. v. Brandon*, 87 Ohio St. 187 [100 N. E. Rep. 325], is that the omission to look before going upon a crossing is not negligence in all cases as matter of law. For aught that appears here it may be that the decedent looked before going upon said crossing, and in the absence of proof to the contrary the presumption is that he did so look, *Interurban Ry. & Term. Co. v. Hines*, 32 O. C. C. 355 (13 N. S. 170); *Continental Improvement Co. v. Stead*, 95 U.

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S. 161 [24 L. Ed. 403]; *Texas & Pac. Ry. v. Gentry*, 163 U. S. 353 [16 Sup. Ct. Rep. 1104; 41 L. Ed. 186], and observing the car at such distance as that he supposed and believed that he could safely pass over said crossing, and attempted to cross, if he did, this would not be negligence, or observing said car at the summit of said elevation and his horse and carriage being plainly visible to the motorman in charge of said car, and being first at said crossing, he may have relied upon his right to cross over said crossing before said car, even though the motorman was called upon to slacken the speed of said car, or, if necessary, to stop the same to avoid a collision. The first at said crossing under the facts stated, had the right to cross, for a street car company must operate its cars with reference to the rights of others traveling on a street and over street crossings. The motorman testified that he saw this horse and carriage approaching said crossing when some 300 feet distant therefrom, and it seems that he saw them plainly, too, for he testified that he even saw the opening in the rain-apron for the lines, and if this is true, did he not have ample time and opportunity to get his car under control before reaching said crossing as to have avoided the injury that followed said collision? Having seen the horse and carriage approaching said crossing at such distance, and about to cross, and on the crossing at the time of the collision, in the face of testimony that there was no change in the speed of the car from the summit of said elevation to said crossing, even in view of the claim of the motorman that the car was running but eight or ten miles an hour and that the horse apparently halted, as claimed, what was left for the jury to do under proper instructions? Concerning the relative rights of the public and traction companies at street crossings, in *Toledo Elec. St. Ry. v. Westenhuber*, 12 Circ. Dec. 22 (22 R. 67), the circuit court of Lucas county held, in a collision case between a street car and a carriage crossing the tracks of a street railway at the intersection of two streets that:

"1. It is negligence in the motorman of an electric street car when the car is from 150 to 200 feet from a street crossing, and he sees a wagon about to cross the track, not to try to stop



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or slacken the speed of the car until almost at the crossing, when by so doing the collision which ensued might have been avoided.

"2. It is not negligence in the driver of a wagon to attempt to drive across a street car track ahead of an approaching electric car, when the car is so far away that by the exercise of reasonable care it might be stopped before reaching the place of crossing."

In *Harris v. Railway*, decided by the court of appeals for Cuyahoga county, and reported in 36 O. C. C. 17 (21 N. S. 209), it is held that:

"A street car company has only equal rights with the driver of a horse, or a pedestrian, at a street crossing, and therefore it is the duty of the motorman as he approaches the street crossing to have his car under control and to keep a constant lookout, not only ahead, but also to the right and left, so as to discover persons upon the track or approaching it without noticing or heeding the approaching car, so that he may allow them to pass over in safety."

In *Greve v. Traction Co.* 36 O. C. C. 26 (21 N. S. 331), the court of appeals for Hamilton county held that:

"In an action by a driver who was thrown from his seat and injured in a collision between a traction car and his vehicle, it is error to direct a verdict for the traction company where the evidence tends to show that the vehicle could have been clearly seen by the motorman, crossing from one side of the street to the other, in time for him to have avoided the accident by stopping or checking the speed of the car."

In *Lake Shore & M. S. Ry. v. Schade*, 8 Circ. Dec. 316 (15 R. 424), it is held that:

"If the decedent in this case was negligent in going upon the track in the manner and at the time he did, yet if the engineer in charge of the train ought, by the exercise of ordinary care, to have seen the decedent in his perilous position, and could, by the exercise of ordinary care, have stopped or checked the speed of the train so as to avoid a collision, and failed to do

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so, it was negligence for which the company is liable, notwithstanding the negligence of the decedent in going upon the track.

"If the decedent was negligent in going upon the track as he did, yet if after such negligence the persons in charge of the train, by the exercise of ordinary care, could have seen the decedent in his dangerous position and stopped or checked the speed of the train and avoided the injury, and they failed to do so, they were guilty of negligence, and such negligence is the proximate cause of the injury, and the railroad company is liable."

The same rule was also followed by the circuit court in this district in the case of *Mansfield Ry. L. & P. Co. v. Kiner*, 35 O. C. C. 175 (17 N. S. 175), which was affirmed by the Supreme court.

And in *Steubenville & W. Trac. Co. v. Brandon*, *supra*, p. 196:

"It is not negligence in the driver of a vehicle to attempt to cross a street car track ahead of an approaching car so far away that by the exercise of reasonable vigilance on the part of the motorman it might be stopped or checked before reaching the crossing."

It would seem that the foregoing adjudications ought to be decisive of the rights of the public and street car companies at street crossings, but it is contended that the evidence shows that the death of the said Albert N. Gillette was caused by his own negligence—that his negligence contributed to his injuries and consequent death. As already stated, when about to enter upon said crossing he may have relied on the presumption of said car being at such distance, and under control of the motorman, especially when running down grade, as that he could safely pass over it, or, having been first at said crossing and said car being some 300 feet distant and presumably traveling at such speed as that the motorman would not be unmindful of the rights of the public at said crossing, he attempted to cross, or he may even have been guilty of negligence in driving upon said crossing, but if the motorman after having seen the horse and carriage at the place and in the condition stated by him,

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and if after having seen the peril of the decedent, if he did, and he then had time and opportunity to avoid a collision between said car and said horse and carriage by checking or even stopping said car, and he neglected to do so, would not such neglect be actionable negligence and be regarded as the proximate cause of the said Albert N. Gillette's death? If guilty of such neglect, we think a liability would follow from the rule laid down in *Steubenville & W. Trac. Co. v. Brandon, supra*, which appears to have been followed by the trial court in its instructions to the jury. It was urged on the part of the plaintiff in error that it was impossible for the motorman to avoid said collision because of the close approach of said car to said crossing and because of the slippery condition of the surface of the tracks of said railway after the apparent halting of said horse and after the motorman released the air of said car.

The inquiry naturally arises that if the tracks were slippery, would not such fact require increased vigilance on the part of the motorman to see to it that the car be kept under safe control? Such inquiry would seem pertinent when it is considered that said car was running down grade according to the testimony of engineer Core, just prior to reaching said crossing. In commenting upon the necessity of a motorman keeping a car under control when descending a grade, 2 Thompson, Negligence Sec. 1395, says:

"Upon the question what rate of speed is to be deemed unreasonable or dangerous, no exact definition can be made; but the obvious conclusion of reason is that a rate of speed which prevents the motorman from maintaining control of his car so as to stop it within a reasonable distance upon an appearance of danger to others, falls within this category, and, on the other hand, that a rate of speed which, although greater than usual, does not prevent the motorman from keeping his car well in hand, and does not endanger persons using the street with reasonable care for their own safety, is not negligent or blameworthy. The true view is that the railway company must not adopt such a rate of speed as will prevent its motorman from keeping control of the car, especially upon a down grade, and

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if a car can not otherwise be kept under control, the sanding of the tracks may be regarded as a reasonable means to be adopted for that purpose, the failure to resort to which may be negligence."

But as we view it, this was a question of fact, including the conduct of the motorman in respect to the speed at which he was operating said car between the summit of said elevation and said crossing as tending to show whether or not he was exercising reasonable care in the management of said car, and including also the circumstances under which said decedent drove upon said crossing for the purpose of passing over the same, all of which were questions of fact as bearing upon the alleged negligence of the defendant, or contributory negligence of the decedent, which were to be submitted to and determined by the jury under proper instructions. *Gibbs v. Girard, supra*. Upon a review of this record we are of the opinion that said verdict is not clearly against the weight of the evidence, nor is the same unsupported by evidence sufficient to warrant said verdict.

It was urged that the court below erred in its instructions upon the law to the jury, and upon a request made for further instructions that said court further erred in repeating such erroneous instruction to the jury. It appears that after said court had instructed said jury and after they had retired for deliberation they requested further instructions by said court, as appears by the following on page 115 of the record:

"Thereupon at 10 A. M. the jury retired to their room for deliberation, and at 1:30 P. M. the jury returned into court and asked for further instructions.

By the court: Gentlemen of the jury, the bailiff has instructed the court that the jurors have requested the court to give them further instructions on the law of this case. Is that correct, Mr. Foreman? Mr. Foreman (Mr. Willis): The jury merely wish to ask the court to read the part of the charge referring to a similar case where negligence may be found on both sides. It was not understood by all of the jurors, whether deficient ears or memory we don't know.

By the Court: I will read it to you, gentlemen, having it

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in pencil form before me, that part of the charge which has been requested by your foreman:

"In other words gentlemen of the jury, the decedent, Albert N. Gillette, may have been guilty of negligence in driving upon this track as he did, yet such negligence will not defeat the right of the plaintiff to recover, if the motorman saw the danger in which he was placed in time to have avoided colliding with him by the exercise of reasonable care and by the use of all of the means at his command, and negligently failed to exercise such reasonable care. That is, if you find that there was negligence upon the part of the railway company, and negligence upon the part of Gillette, in driving upon this track in front of an approaching car, then you will proceed and examine the conduct of the motorman after he had discovered, or by the exercise of ordinary care ought to have discovered, the danger in which the said Albert N. Gillette was at the time. As we have said, it was the duty of the motorman to have his car under control; that is, the car must be in the power of the motorman to such an extent as that when he saw this horse and buggy on the track, or when by ordinary care in his duty of looking for vehicles he ought to have seen this horse and buggy on the track, he could stop his car within a reasonable time and distance so as to avoid, if possible, the collision.'

Do you desire the court to read any further?

Mr. Foreman: I guess that is sufficient, as far as I am concerned.

Court: You may retire."

The foregoing instruction is claimed to be not only erroneous but prejudicially erroneous for which the judgment below should be reversed. It is claimed by the plaintiff in error that the trial court in giving said instruction sought to introduce and apply the rule of liability under what is known as the "last chance" doctrine when the allegations of the petition of the plaintiff below do not warrant the application of such rule, and that the facts of the case are such as to defeat the right of said plaintiff to recover. What, then, is understood to be the

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doctrine of the "last chance"? In 2 Thompson, Negligence Sec. 1629, we find it defined as follows:

"Although a person goes upon a track negligently, yet if the servants of the railway company, after they see his danger, can avoid injuring him, they are bound to do so. And, according to the better view with reference to injuries to travelers at highway crossings, as distinguished from injuries to trespassers and bare licensees upon railway tracks at places where they have no legal right to be, the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them."

This definition appears to have been adopted in *Drown v. Traction Co.* 76 Ohio St. 234 [81 N. E. Rep. 326; 10 L. R. A. (N. S.) 421; 118 Am. St. Rep. 844].

Looking at the averments of the petition of the plaintiff below we find that after averring that said decedent approached said tracks to cross the same, and while in the exercise of due care, said car approached said crossing at a high and dangerous rate of speed, it is averred that:

"When the said decedent started across the track of the defendant's railroad, the motorman in charge of the said car could see the decedent starting across or upon the track with his said horse and buggy more than 300 feet away, and that said motorman knew that at the speed he was running the car, it would strike said horse and buggy before it could cross said track; but plaintiff avers that the decedent did not know the speed of the car and could not learn its speed from his position, and avers that decedent reached the track when the car was at least 300 feet away, and had a right to cross said track, and that the agents, servants and employes of the defendant had ample time after seeing as they did the decedent crossing the track, to check the speed of the car and stop it and thereby have prevented the collision, and the plaintiff says that the agents, servants

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and employes of the defendant in charge of said car, negligently, recklessly and wilfully approached said crossing at a high rate of speed and ran against the horse and buggy of said decedent with great force and violence and thereby hurled him from the buggy to the ground."

These averments, in our judgment, brought the case within the rule stated and warranted the trial court in submitting said case to the jury under instructions embodying said rule of law. In giving said instructions the trial court appears to have followed the instructions in the case of *Cincinnati Trac. Co. v. Jennings*, 19 Dec. 338 (7 N. S. 462), affirmed, no op., *Cincinnati Trac. Co. v. Jennings*, 79 Ohio St. 435, wherein it is held that:

"It is not error to charge that where the jury have found that both the plaintiff (driver of a cab) and the motorman of the car which collided with the cab were negligent, they may then take into consideration whether the motorman had his car under control to such an extent that he could have avoided the accident after he saw, or by the exercise of ordinary care could have seen, the vehicle on the track.

"Nor is it error to charge that 'it is not negligence in the driver of a vehicle to attempt to cross a street car track ahead of an approaching car, when the car is so far away that by the exercise of reasonable care it might have been stopped before reaching the place of the crossing,' where the circumstances of the case render such a charge appropriate."

We are not unmindful of the contention made by the plaintiff in error as to the finding of the court on the rehearing of said case, but the Supreme Court held that the instruction given to the jury on the alleged negligence of the traction company and that of the decedent was a correct statement of the law.

Upon an examination of the facts in the case of *Drown v. Traction Co. supra*, we find the facts stated in that case to be entirely different from the facts stated in the case at bar. Here it is admitted that the motorman plainly saw said horse and carriage at all times from the time said car reached the top of said elevation to the time it descended said elevation and

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reached said crossing, and likewise saw, or by the exercise of ordinary care could have seen, the peril of said decedent in said carriage, and neglecting and disregarding the rights of said decedent when upon said crossing in said carriage, carelessly and recklessly ran said car upon and against said horse and carriage throwing said decedent out of said carriage and hurling his body some thirty feet and more distant, resulting in his death, while the former case involved a charge of negligence by the traction company for a violation of a city ordinance in failing to give warning of the approach of one of its cars on its tracks to one driving on such tracks in a street going in the same direction as said car. It was not in any sense a street crossing case and the holding made was made with reference to the particular facts in said case. In the matter of the elements of negligence laid as the bases of said actions, we are of the opinion that the cases are essentially different, and we are further of the opinion that the instruction given by the trial court to the jury was proper, that it contained a correct statement of the law as applied to the facts in the case, and that it fairly and impartially presented said case under the issues to the jury.

We have examined the other specifications of error in said petition in error and find no such error in the record as justifies a reversal of the judgment of the court below.

Upon an examination of the entire record, notwithstanding the errors complained of, we are unanimously of the opinion that the case is one in which substantial justice has been done between the parties hereto, that no substantial right of the plaintiff in error has been prejudicially affected by the judgment herein and that said judgment ought to be and the same is affirmed, at the costs of the plaintiff in error. Said case will be remanded for execution.

**Houck and Powell, JJ., concur.**



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### CHARGE TO JURY—STREET RAILWAYS.

[Richland (5th) Court of Appeals, 1915.]

Shields, Powell and Grant, JJ.

(Grant, J., of the eighth district sitting in place of Judge Voorhees.)

MARY HARRIS v. MANSFIELD RY. L. & P. Co.

1. Evidence of Motormen as to Running and Means of Stopping Car, Though Quasi Conclusions of Experts, Competent.

In an action for injuries to one riding in an automobile, suffered in a collision with an electric car, the evidence of motormen, with reference to running of the car and means for stopping it, is not rendered incompetent by reason of the fact that their testimony was in a sense that of experts involving quasi conclusions which it is the special province of the jury to deduce.

2. Written Instructions Requested and Given Before Argument Properly Sent to Jury Notwithstanding Charge is Oral.

It is not error to send to the jury room written instructions asked for and given before argument; and so doing is not inconsistent with the fact that where the charge given after argument is oral, it is impossible that instructions so given should also be sent to the jury room.

3. Last Chance Doctrine Must be Pleaded to Instruct Upon It.

The doctrine of last chance must be pleaded to entitle a party claiming its benefits to instructions upon it.

*Brucker, Voegelé & Henkel*, for plaintiff in error.

*McBride & Wolfe*, for defendant in error.

#### GRANT, J.

This proceeding seeks the reversal of the judgment of the court of common pleas, because certain errors, as is alleged, have intervened and are shown by the record to the prejudice of the complaining party.

The parties here, as to position, stand in the order of their standing below.

The plaintiff declared on certain acts and omissions amounting to alleged negligence in the operation of one of its cars, whereby she without contributing fault on her part came to her injuries while riding as an invited passenger in an automobile, as was said by her.

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The defendant denied the charging parts of the petition by its answer, and retorted certain acts and omissions by the plaintiff as the causes which proximately contributed to, if they did not directly occasion, the hurts received by her. Upon issue joined as to the latter by reply, the cause was put upon its trial to a jury. There was a verdict for the defendant, upon which judgment was entered, after a motion for a new trial had been denied. To reverse that judgment is the prayer of this petition in error.

The main alleged grievances relied on to work such reversals are as stated in the brief of the plaintiff as follows:

"First. Evidence admitted for the defendant and objected to by plaintiff; refusal to admit proper cross-examination of motorman.

"Second. Upon the weight of the testimony plaintiff was entitled to recover.

"Third. Error in giving special request to the jury.

"Fourth. In sending to the jury the written request of the defendant below, given to the jury before argument."

"Fifth. In refusing to instruct the jury to consider the oral charge in connection with the written request of the defendant below; in other words, allowing the jury to take the written request of the defendant below to the jury room and not instructing the jury to consider the same in connection with the oral charge given in this case.

"Sixth. Error in generally charging the jury."

In substance we are of the opinion that some of this rather formidable assignment of errors may be considerably abridged in the discussion of the principles and authorities involved. through the operation of the law of the survival of the fittest.

The first of these has to do with the admission of evidence from two motormen, which partook—necessarily—of the nature of expert information thus imparted to the jury. Equally necessarily, as we think, it carried with it something looking like *quasi* conclusions, which it is vehemently urged in argument was a clear invasion of what should always be the open and unshared field of the jury.

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No inconsiderable part of the not inconsiderable brief of the plaintiff—in fact thirty-six out of its sixty-five pages—is devoted to this one question. A bead roll—it might be called the long roll—of 542 cases are cited in support of this one contention. The brief is quite a misnomer. It is not brief. In this array, bristling with citation, five times the roll of this Union, from Alabama to Wisconsin, is called and then the briefer invades England by running the blockade or sailing in judicial Zeppelins. Lest complaint should be made of want of good measure, a lot of cases from the Supreme Court of the United States are thrown in to make the scale beam kick high. In all this ransacking of the armories of case law for weapons to work a reversal, scant attention is paid to a state still on the legal map—to-wit, Ohio. It would, perhaps, be over-putting it to say that in this brief without brevity, Ohio has not been paid “the cold respect of a passing glance,” but the fact is pretty near that. The case upon which in our opinion this allegation of error must decisively turn, is not mentioned in the main brief of the plaintiff. It is only when it is brought forward under a vigorous claim of being a binding authority here, in the defendant’s brief, that some attention is paid to it in the reply brief of the plaintiff. It is the case of *Bellefontaine & Ind. Ry. v. Bailey*, 11 Ohio St. 333, the syllabus whereof is as follows:

“In an action to recover damages against a railroad company for the killing of plaintiff’s horses by means of the negligence of the servants of the company in running and management of a locomotive and train, the engineer in charge of the locomotive at the time of such killing, who saw the horses when they came upon the track, who is shown to be acquainted with the business of running railroad locomotives and trains, and had been engaged in such business for five years, is competent to testify as an expert, upon questions in respect to the management of locomotives and trains, and to give an opinion whether, in view of the distance between the engine and the horses when the latter came upon the track, it was possible to avoid the injury complained of.”

Because of the long roll referred to, we have examined this

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case with unusual care, to see if it is to be distinguished to any material effect from the case at bar, and we do not see why it can be. We do not see why it should be. The reasoning that must, coercively as we think, be brought to bear upon its application to this case, appears to us to be conclusive. The motormen witnesses were conversant, technically as well as actually, with the workings of their cars and the foundation in this respect for the introduction of expert and opinion testimony was sufficiently laid. The fact that these experts led what may be called a dual life in this particular—that is, that they were expert mechanics and at the same time practical motormen should not, we think, detract from the value of their testimony. Rather, it should seem, it would add to it in its application to a concrete case in hand, if they were truthful men. They can not divorce themselves from this two-fold relation. The fact that it is double is but an accident of the particular situation. There is nothing disclosed by the record looking like dishonesty in their testimony. If they testified under the fear of losing their employment with the defendant company, it is not apparent here. And if it was, it would be a matter of weight and not competency. And in such case a plaintiff almost never fails to get the benefit of the fact by inveighing to the jury against witnesses who swear with the customary halter of fear of losing their jobs around their necks.

So much for the underlying principles involved.

We have examined the matter also in the light of Judge Brinkerhoff's rather informing opinion in the case cited. His reasoning and the authorities marshalled by him to support it are cogent and convincing. They seem to put the decision on such satisfactory grounds that it has not since been disturbed, though often invoked and often challenged, no doubt, and as we must think followed in cases to which it has been thought proper to appertain.

In any event, if applicable to the case in hand, it is conclusive on us. We think it is so applicable, and applying it we find that the ruling of the trial court in admitting the testimony in question was not obnoxious to the complaint lodged against it

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in this proceeding. We are confident that the weight of authority really bearing on this precise question supports and reinforces this conclusion.

The next assigned error is in substance and effect—although differently worded in the brief—that the verdict and consequent judgment is against the manifest weight of the evidence and is not supported by the evidence.

That question, in this case, was so peculiarly a matter for the jury to determine when properly instructed by the court, that we do not feel justified in canvassing it in much detail. Each side has its view of the case, and each accordingly directed its evidence to that view of the facts which sustained its contention. That this resulted in narrations radically in conflict with one another, was to be looked for. It was for the jury to say with which side they found the truth to reside, when they applied the law the court gave them to the facts before them. By their verdict they have spoken and we can find nothing in their verdict that is manifestly against the facts the jury might appropriately have found in sifting the testimony brought before them and applying the law to these. We are not a jury nor a substitute for a jury. If we were, we are not prepared to say that upon the facts disclosed by this record we should have found differently.

In regard to the next assignment of error, to the effect that the requests to charge before argument should have been refused, our opinion is that the point is not well taken. To our apprehension they state the law of Ohio appertaining to the issue.

The fourth allegation of intervening error is that the court sent the written requests to instruct before argument to the jury in their retirement, to be used by them when they should consider of their verdict. In so doing the court did only what we understand to be the bidding of the statute in that respect. Otherwise the right to have the instructions framed in writing and given without change in verbiage would, it should seem, be a rather barren right. There was no error in this.

It is next complained—seemingly—that the court sent the

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written instructions to the jury, but did not send the general charge, so that the two might be comparatively considered in connection with each other—which it is said should have been done.

As the general charge was wholly oral, as is said, how it could have been thus sent, except through the friendly aid of a dictograph, is not perceived. The fact seems to be that counsel for the plaintiff were taken by surprise by the oral charge and did not think of asking to withdraw a juror—not till now. Counsel were wrong about this. They should not be surprised at anything. "*Semper paratus*" is, or should be, their slogan, instead of "Onward, Christian Soldiers"—to a job, or in this case a verdict.

The last assignment is leveled at the generally bad character of the charge as given to the jury.

The complaint is a little nebulous in our estimation, when we come to details. We do not care, therefore, to discuss the matter very minutely. What the trial court should have done if requested to give instructions in charge to the jury, if those given were deemed insufficient, need not be discussed where no such request was made. What should have been charged without request, because it was in the case, is another matter. Our attention in this respect is challenged to the claim that the doctrine of the last chance, and possibly other matters, was in the case and should in fairness have been dealt with by the court below in its charge to the jury. To this it is answered that the doctrine of the last chance must be pleaded to entitle a party claiming its benefit to an instruction upon it, and that without so pleading it, it is not to be considered. The reply to this proposition is that the office of pleadings is to present in an orderly form the issues to which all the relevant evidence in the case must be directed, so that—such is the argument—the whole issue consists of what arises from the evidence adduced, the evidence constituting the real issue, the function of the pleadings being to conform the latter to the former, as it may be developed upon the trial. Upon a rational footing, we should think the latter view to be the true view. Even the opinion of the Su-

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preme Court, in *Drown v. Traction Co.* 76 Ohio St. 234 [81 N. E. Rep. 326; 10 L. R. A. (N. S.) 421; 118 Am. St. Rep. 844], does not seem to be to the contrary. It is true that the syllabus there says:

"3. Since the plaintiff can recover only upon the allegations of his petition, he can not recover upon negligence, which warrants the application of the rule of 'last chance' without alleging it in his petition."

Yet Judge Davis seems to flinch from so guarded an interpretation as this, for in the opinion in the same case, page 249, he explains:

"It is clear, then, that the last chance rule should not be given as a hit or miss rule in every case involving negligence. It should be given with discrimination. Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that the defendant after having notice of the plaintiff's peril could have avoided injury to the plaintiff and there is no testimony to support such charge, the giving of such charge would be erroneous."

Here we have the Supreme Court of Ohio against the Supreme Court of Ohio, in the same case. But, as the syllabus is supposed to state the law rather than the opinion, in case of conflict between the two, perhaps we should follow the former.

However, later, in *Palmer v. Humiston*, 87 Ohio St. 401 [101 N. E. Rep. 283], the syllabus says:

"1. The issues of a case are defined by and confined to the pleadings."

If words level to the comprehension of lawyer and layman alike go for anything at all, it would seem that this last deliverance is fatal to the contention made here.

But hold! In *Rayland Coal Co. v. McFadden*, 90 Ohio St. 183, the same Supreme Court is in the syllabus made to say:

"In such case the issue of contributory negligence is not made by the pleading, but is raised by the evidence properly offered by the parties in support of their respective claims as made in the pleadings. The issue of contributory negligence

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thus raised is to be determined by the same rules as to burden of proof and otherwise as if made by the pleadings."

If one issue may be raised by the evidence in a negligence case, by the same token it is hard to see why another issue may not be so raised.

And there you are! This time it is the Supreme Court of Ohio against the Supreme Court of Ohio against the Supreme Court of Ohio in two cases, but with the same judges deciding in each. When that lawsuit comes off we want to be there to see which side wins. Until then, we must be content to be no wiser than the sages of the law who are put in high places over us. And until then we must leave this much mooted question where those same sages have left it—in *nubibus*—very much so.

Upon what we have tried to make an impartial survey of the record before us, we feel that we ought to adhere to the former judgment in this court in *Northern Ohio Trac. & L. Co. v. Jenkins*, 36 O. C. C. 30 (19 N. S. 602), of which the syllabus is as follows:

"Nor will the judgment based upon such a finding be disturbed for technical errors in the admission of evidence or the charge of the court, where it appears from the entire record that substantial justice has been rendered under all the circumstances."

In closing this opinion it may not be amiss to say an after word, lest from what has been said in respect of a brief in this case, more may be inferred than was intended, and lest the implied criticism thereupon be thought too harsh.

We are told in the good book that "All scripture is \* \* \* profitable for doctrine, for reproof, for correction, for instruction in righteousness." In what was said and will now be said, all thought of "reproof" or of "correction" in a penal sense is disclaimed. Something "profitable" by way of "doctrine" and "righteousness" is not despaired of.

The mere mechanic-at-law, as Theodore Parker used to call him, and his work by the yard, or hundred, or on the piece-price plan, should distinctly lack encouragement by the profession, no matter how sharp his tools are or however conveniently ar-



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ranged these may be in the tool box. One case decided by the court of last resort in the state of the forum which is in point, shall chase a thousand cases somewheres near in point, and a like number from other states brought forward to overthrow it. The latter are apt to have an effect on the judicial mind, charged with too much work to delight in listening to the roll call of the states, akin to that produced by a catswamp on agriculture—the ground is too overloaded with underbrush to bring good crops.

Out of the “six hundred” and odd cited cases, on which the “Light Brigade” have ridden into the jaws of death, in the brief we have two, the titles of which are very suggestive. One is “*Radam v. Microbe Destroyer Co.*” The other is “*Union Painless Dentist v. Dement.*” If the “microbe” for using the scissors on a digest and asking people to read the scissorings could be reached by the “Destroyer Company,” the first case would be in point. If the citer had to use his jaws instead of a typewriter, the work of the “Union Painless Dentists” would be in point, or else another syllable would have to be added to the name of the defendant, “Dement.”

We observe also a case in which the “Highland Boy Co.” is a party and one in which Mr. “Pepper” is plaintiff. Neither of these reconciles a tired man with briefs that are anything—almost—but brief.

My brethren are not responsible for this comment, although it is to be hoped that they may share in the usufruct, if so be any briefer is exercised thereby.

We find no material error to the prejudice of the complaining party, in this record, nor are we able to say that substantial justice has not been done by the judgment complained of. For which reason it is affirmed.

**Powell, J., concurs.**

**Shields, J., dissents.**

## Hamilton County Appeals.

## STREET RAILWAYS.

[Hamilton (1st) Court of Appeals, April 19, 1913.]

Jones, Jones and Swing, JJ.

\*FRANK GREVE V. CINCINNATI TRAC. CO.

**Failure of Motormen to Check Speed or Stop Car before Collision with Vehicle Appearing by Evidence Makes Direction of Verdict for Defendant Error.**

A driver of a vehicle injured in a crossing collision observing a street car about 200 feet distant rapidly approaching the street intersection, across which he started to drive diagonally to avoid an obstruction in the straight way, is not thereby negligent as a matter of law; hence, its appearing that the vehicle could have been clearly seen by the motorman in time for him to have avoided the accident by stopping or checking the speed of the car, it is error to direct a verdict for the traction company defendant.

*Thomas L. Michie, Harry H. Friedman and Jacob S. Hermann*, for plaintiff in error.

*Joseph Wilby*, for defendant in error.

**JONES, O. B., J.**

Plaintiff drove a two-horse carriage carrying four passengers west on Eighth street which has, in the center of the street, double car tracks. Just after crossing Linn street he found the north side of the street in which he had been driving obstructed with a pile of gravel, granite blocks and street paving material, where the track was being repaired, so that it was necessary for him to cross over the tracks to the south side of the street in order to continue on his way. This he proceeded to do. When he started to cross the tracks diagonally he saw a traction car coming in the opposite direction, going eastwardly on the south track and as he testified some 200 feet away from him. Other witnesses fix the distance of the car from the crossing when it commenced to cross the tracks at from 150 to 300 feet. All the witnesses agree that the car was running at a

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\*Affirmed, no op., Cincinnati Trac. Co. v. Greve, 91 O. S. 000 (60 Bull. 20).

## Greve v. Traction Co.

"pretty fast" rate of speed and that the speed of the car was not in any way slackened until it was very close to the carriage—within fifteen feet one witness testified. The carriage was struck by the car on or near the hind wheel, although one witness thought it was at its front part from the fact that the lamp was injured. The driver was thrown from his seat to the street and was severely injured, his leg being broken and his shoulder dislocated.

The evidence tends to show that the motorman of defendant's car should have clearly seen the carriage upon the tracks, and that if he made proper effort to slacken the speed of his car and have it under control he could have avoided striking the carriage.

At the conclusion of the evidence offered on behalf of plaintiff the trial judge instructed a verdict for defendant.

In *Toledo St. Ry. v. Westenhuber*, 12 Circ. Dec. 22 (22 R. 67), which was a case of collision between a street car and a vehicle crossing a track at the intersection of two streets, the court held:

"It is negligence in the motorman of an electric street car, when the car is from 150 to 200 feet from a street crossing and he sees a wagon about to cross the track, not to try to stop or slacken the speed of the car until almost at the crossing, when by so doing the collision which ensued might have been avoided.

"It is not negligence in the driver of a wagon, to attempt to drive across a street car track ahead of an approaching electric car, when the car is so far away, that, by the exercise of reasonable care, it might be stopped before reaching the place of crossing."

In *Toledo Consol. St. Ry. v. Rohner*, 6 Circ. Dec. 706, 708 (9 R. 702), affirmed, *Street Ry. v. Rohner*, 57 Ohio St. 667:

"This wagon was in plain sight of the motorman on the car. \* \* \* He came up this grade toward this bridge at a speed which, from his own story, was so rapid that when he saw that the wagon was not going to get out of the track he could not stop the car in time to avoid a collision. We think it was a fair question to submit to the jury, whether the railroad

## Hamilton County Appeals.

company, through its motorman, was negligent when it could not stop the car under these circumstances in time to avoid a collision with a vehicle in plain sight in front of it."

But counsel for defendant in error contend that these cases do not apply, because they fix the rule as to the right of persons to cross street car tracks at the intersection of streets and this accident occurred at least 100 feet from the intersecting street.

The same court in *Lake Shore Elec. Ry. v. Majewski*, 25 O. C. C. 55, 59 (1 N. S. 305), discusses the right of drivers not at street crossings:

"When they come upon the track of the company between streets, in other words, people driving vehicles along a street are not bound to keep away from the tracks of the street car company, as they are to keep away from the tracks of a steam railroad in the open country. They have a right to use the street, as well the part of the street where the tracks are as other parts of the street, \* \* \* and as this woman did \* \* \* to drive there ahead of the street car when the car was so far away that by the exercise of reasonable care she might suppose she had time to pass by such vehicles would not, in our opinion, be negligence. The street car company can not insist that the speed of its cars shall not be retarded by people driving in ahead of cars upon the streets when in the use of the street the exigencies require them to drive upon the tracks, they may drive there and the street car company must retard the speed of the car to allow them to use that part of the street as well as the part where the tracks are not laid."

And the latest case on the subject by the Supreme Court, *Steuenville & M. Trac. Co. v. Brandon*, 87 Ohio St. 187, paragraph 3 of the syllabus is as follows:

"Where the motorman of a street car being operated on a public street in a much frequented part of a city, discovers, or by the exercise of ordinary care and watchfulness should discover, that the driver of a smaller vehicle is about to cross the track at a street crossing, in front of such car, it is the motorman's duty to use ordinary vigilance to stop or check the car in order to avoid a collision; and the fact that such driver

## Greve v. Traction Co.

may have omitted to look for the approach of the car, will not, as a matter of law, defeat his right to recover for injury from a collision with such car if the motorman has not used such vigilance."

And in the opinion on page 195 Judge Spear uses the following language:

"It is possible he did look and, mistaking the speed of the car, thought he could safely cross, thus attempting to exercise an undoubted right in a public street. If he did it would be a question for the jury whether a man of ordinary prudence, situated as he was then situated, would have done as he did.

\* \* \* The driver of such a vehicle is not, in the use of the street, a trespasser, nor a licensee, but one pursuing an undoubted right, and the question always is, did he, in the pursuing of that right, exercise ordinary care? Nor is he bound to refrain from going upon the crossing merely because a street car is in sight. If he reaches the crossing first he is entitled to cross unless it should appear that the car is in such close proximity, and traveling at such speed, as to make it impracticable to check the same in order to permit him to cross in safety.

\* \* \* It is not negligence in the driver of a vehicle to attempt to cross a street car track ahead of an approaching car so far away that by the exercise of reasonable vigilance on the part of the motorman it might be stopped or checked before reaching the crossing.

"But, assuming that Brandon was guilty of some negligence in driving on the track, yet if the motorman, in the exercise of even ordinary care, after he saw the horse and appreciated Brandon's peril, had time and opportunity to avoid the possible consequences by checking the car, and neglected to so exercise such care, such neglect would be negligence and might properly be regarded as the proximate cause of the injury.

"Such a situation presents a case where different minds might reach opposite conclusions, and thus was a proper case for a jury under proper instructions."

This case was also where the accident was at a street crossing, but the principles laid down apply to the case at bar. In

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the opinion of this court, the court below erred in directing a verdict for defendant. The judgment below is reversed and the case remanded for new trial.

Jones, E. H., and Swing, JJ., concur.

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STREET RAILWAYS.

[Tuscarawas (5th) Court of Appeals, 1914.]

Voorhees, Shields and Powell, JJ.

NORTHERN OHIO TRAC. & L. CO. v. THOMAS E. JENKINS, ADMR.

**1. Contributory Negligence of Passenger, Alighting from Street Car Standing Still then Struck by Same Car Backing, Question for Jury.**

Whether the striking by a backing car of one who had just alighted therefrom while the car was at a standstill, was due to the negligence of the traction company or its operatives or to the contributory negligence of the one so injured, is a question for the jury, and their finding where supported by the evidence will not be disturbed by a reviewing court.

**2. Substantial Justice Done Judgment not Reversed.**

Nor will the judgment based upon such a finding be disturbed for technical errors in the admission of evidence or the charge of the court, where it appears from the entire record that substantial justice has been rendered under all the circumstances.

**PER CURIAM.**

This was an action commenced in the court of common pleas of this county by the defendant in error, Thomas E. Jenkins, as administrator of the estate of Edmund F. Jenkins, deceased, against the Northern Ohio Traction & Light Company, plaintiff in error, for its negligence in causing one of its cars to run over the said Edmund F. Jenkins and causing his death.

In his petition filed in the court of common pleas the plaintiff alleged, in substance, that he is the duly appointed administrator of the estate of Edmund F. Jenkins, deceased, and that the defendant company is a corporation operating an electric street railway extending in part from Canal Dover through New Philadelphia and Midvale to Urichville in said county.

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That on the evening of March 21, 1912, about 6:50 P. M., the said Edmund F. Jenkins was a passenger on one of the defendant's cars from New Philadelphia to Midvale, paying his fare therefor. After riding on said car to a switch near Midvale and after said car had come to a full stop, and after the conductor on said car was made aware of the fact that the said Edmund F. Jenkins would alight at said switch, said conductor consenting the said Edmund F. Jenkins, after said car came to a full stop, alighted from said car from the rear platform on the south side thereof, and after so alighting he started for his destination by attempting to cross said defendant company's track by passing around and in the rear of said car, which was not then in motion, and at a distance of several feet therefrom, when, without his fault, the defendant, by its conductor and motorman who were in charge and control of said car then on said main track, caused said car to suddenly start and move at a high rate of speed backward and in an opposite direction, to-wit, northwesterly, from that in which it had been running, wrongfully, negligently, carelessly and unskillfully moving said car backward and in the direction toward where the said Edmund F. Jenkins was crossing said track, and that in so moving said car backward as aforesaid, without any signal being given by the defendant or its agents or employees, and without the ringing of any bell, or the sounding of a gong, or the blowing of any whistle, or giving any notice or alarm whatever of the starting of said car, or of its change of direction, with no light on the rear end of said car, the said Edmund F. Jenkins was, without any negligence or fault on his part, run over by the defendant's said car, and was crushed and mangled under and between the wheels and trucks thereof, of which injuries he died within a few hours afterwards; all of which was caused by the wrongful, negligent, reckless, unskillful and unlawful acts of the defendant, its agents, servants and employees, in the management and control of said car; and plaintiff averred that said personal injuries and death which ensued resulted to the said Edmund F. Jenkins as a direct, natural and proximate consequence of said acts of the defendant.

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The petition then avers that the said Edmund F. Jenkins left surviving him his widow and children, all of whom were dependent upon him for support; and damages are prayed for against the defendant company by said administrator in the sum of \$10,000.

The defendant filed an answer to the foregoing petition, admitting that on March 21, 1912, the said Edmund F. Jenkins was a passenger on one of its cars from New Philadelphia to Midvale, and paid his fare, but that he voluntarily left said car when the same was near Midvale and that thereafter he walked in front thereof when it was moving backward and was struck by said car, causing injuries to his person from which he died shortly thereafter. It denies the negligence charged in said petition and avers that the injuries so received by the said Edmund F. Jenkins were the result of his carelessness and negligence, and it denies all the other allegations in said petition not specifically admitted to be true.

For a second defense the defendant sets up that before said car stopped at Midvale and while said car was in motion, and against the protest of the conductor of the said car, the said Edmund F. Jenkins left said car, and after alighting therefrom, and after it traveled some distance in the direction it was going, said car backed in an opposite direction upon its track and the said Edmund F. Jenkins carelessly and negligently, and in full view of said car so moving upon said track, stepped upon said track at a time when said car was so near to him that it was impossible for the parties in charge thereof in the exercise of ordinary care to have stopped the same, and that when it was impossible to stop said car in time to avoid striking him and when, if he had looked, he could have seen, and if he had listened he could have heard, said car approaching just before or at the time when he stepped upon said track, and thereby have avoided being struck by said car, and have avoided receiving said injuries which caused his death; that said injuries so received were the result of his own carelessness and negligence in going upon said track in full view of said approaching car. The defendant denies that it was negligent in the operation of its



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said car, and denies that said Edmund F. Jenkins received his injuries because of any carelessness of the defendant, but avers that his injuries and death were caused by his carelessness and negligence as before stated.

To this answer, the plaintiff filed a reply, denying that said injuries received by the said Edmund F. Jenkins, from which he shortly thereafter died, were so received by him because of his own carelessness and negligence, as alleged in the defendant's first and second grounds of defense.

Upon the issues made by the foregoing pleadings the case was submitted to a jury, resulting in a verdict of \$2,500 in favor of the plaintiff. A motion for a new trial was overruled, and judgment was entered upon said verdict. A bill of exceptions was taken containing the evidence upon the trial, including the charge of the court to the jury, and by a petition in error said cause is brought before this court for review and for a reversal of said judgment of the said court of common pleas.

In said petition in error various grounds of error are alleged, among which is that said court erred in the admission and rejection of evidence offered upon said trial. An examination of said bill of exceptions fails to disclose that the action of said court resulted in working any prejudicial error to the plaintiff in error on either of said grounds. In several instances it appears that evidence was admitted against the objection of the defendant below which under the rules of evidence was perhaps not strictly proper, but the effect of such evidence was in nowise prejudicial to the legal rights of the plaintiff in error, and we therefore hold that the contention of the plaintiff in error in this respect is not sustained.

It is also contended that the court below erred in overruling the motion of the defendant below at the close of plaintiff's testimony, and a like motion was overruled at the close of the entire case, to arrest said case from the jury and direct a verdict for the defendant below. A reading of said bill of exceptions shows that the action of said court in this respect was well warranted in the light of the evidence contained therein.

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It is also urged that the court below erred in refusing to give to the jury, before argument, certain written requests submitted to said court by the defendant below; and in giving in its charge to the jury certain written requests of the plaintiff below, to which the plaintiff in error excepted at the time. The requests which said court refused to give to the jury are No. 1 and No. 2, which, for obvious reasons, under the undisputed evidence in the case, we think were properly refused.

It is also contended that said court erred in its general charge to the jury upon the subject of looking and listening for an approaching car before going upon the track of said company, in this, that said court failed to give to the jury the rule laid down in *New York, C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130], wherein it is held that,

"The looking required before going upon a crossing should usually be just before going upon the track," etc.

This is just what the trial court did charge.

Written request No. 4 submitted by counsel for the defendant below to be given in the charge to the jury before argument, reads:

"The court charges you as a matter of law that it was the duty of Edmund F. Jenkins just before he stepped upon the tracks of the defendant company to both look and listen for an approaching car," etc.

The foregoing request was given to the jury by said court verbatim. Under sub-division 5 of Sec. 11447 G. C., it was the undoubted right of the plaintiff in error to have the jury instructed upon the law of the case; and to this end it was the duty of the trial court to give in the charge to the jury all proper and reasonable requests made by the plaintiff in error if they contained sound propositions of law. But it is likewise true that the trial court was not called upon to repeat such instructions, for if they were once given, the duty of said court was discharged, there being no necessity to repeat the same instructions even though in different and varying forms.

Of the various written requests to be given to the jury, before argument, submitted by the plaintiff below, it appears that

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but one of them was given, and that related to the question of damages, where the rule as given is approved by the courts of this state generally.

It is also urged that the verdict of the jury is unsupported by the evidence; that it is against the weight of the evidence, and contrary to law. On account of the insistence of counsel we have carefully read this entire record with special reference to this assignment of error. Notwithstanding the claim made by the conductor in charge of the car upon which the decedent and his son rode from New Philadelphia to the Midvale switch the evening in question, we think the testimony of the son and other passengers on said car clearly showed that said conductor did volunteer the information to the deceased and his son that they could get off said car at said switch, and that decedent after the car stopped at said place, did get off.

Whatever he may have done before that evening in alighting there from a car when in motion is immaterial, as the uncontradicted evidence is that on this evening he alighted from the car after it had stopped; and whether he exercised ordinary care in attempting to cross the company's track after getting off of said car was a question for the jury in view of all the circumstances in the case. Both the alleged negligence of the company and the alleged contributory negligence of the decedent were questions of fact for the jury; and in their determination of these questions it was proper for them to consider whether or not the plaintiff in error had in its employ and service at that time experienced and competent servants managing said car, having in its charge passengers whom it had undertaken to safely deliver at their destination; whether or not the plaintiff in error, by its agents and employees, signaled the backing of said car on the track, and had at said place an employee on the rear of said car while so backing, as called for by the rules of said company, and as a proper regard for the safety of persons who might be crossing said track, in the exercise of ordinary care, required; and whether or not the machinery and equipment of said car was in proper repair. We refer to these features of the case because of the evidence introduced upon the

## Tuscarawas County Appeals.

trial respecting them and which it was the province and duty of the jury to consider in connection with the charge of negligence here made against said company. Indeed, as we view the case, the determination of the above questions may have determined the action of the jury, and these questions being questions of fact, it was the province of the jury to pass upon them; and having passed upon them, we do not think that this court, as a reviewing court, under the evidence presented in said bill of exceptions, should disturb the finding of the jury.

As stated, we have read this entire record with no little care, and we think that the case was fairly tried; that the rights of the defendant below were properly protected and cared for by the action of the court below in its charge to the jury; that said charge was exhaustive and fair to both parties; and taking it all in all, we are of the opinion that the verdict of the jury is not unsupported by the evidence, nor against the manifest weight of the evidence, nor contrary to law; and furthermore, we are of the opinion that the action of said jury by their verdict, and the judgment of said court, express nothing further than the rendition of substantial justice between the parties hereto. In the trial of cases occupying no little time it is not uncommon for technical errors to intervene; but where all the evidence taken upon the trial, including the charge of the trial judge, is before a reviewing court and such court determines that under all the circumstances substantial justice has been done, the judgment will not be reversed for error in the charge of the court below. *Way v. Langley*, 15 Ohio St. 392; *Baird v. Telephone Co.* 30 O. C. C. 107 (10 N. S. 163).

The judgment of the court of common pleas will be affirmed, at the costs of the plaintiff in error. Exceptions may be noted.

**Spangler v. Beare.**

**WILLS.**

[Perry (5th) Court of Appeals, May 2, 1913.]

Voorhees, Shields and Powell, JJ.

**SOLOMAN E. SPANGLER v. JASPER C. BEARE ET AL.**

**Acceptance of Bequest not a Bar to Contest of the Will.**

The acceptance of a bequest of personal property does not bind the beneficiary not to contest the will, as in the case of the acceptance of real property, but the money or property so received may be returned to the executor and the legatee left free to contest the will.

*D. M. Barr and T. B. Williamson*, for plaintiff in error.

*John Ferguson and Stanley B. Crew*, for defendants in error.

**PER CURIAM.**

This was an action commenced in the court of common pleas by the plaintiff in error, who was plaintiff below, against the defendants in error to set aside the will of one Emanuel Beare, deceased, which before that time had been admitted to probate and record in the probate court of this county.

The petition was in the usual form, alleging that the paper writing, purporting to be the will of said Emanuel Beare, deceased, and which had been admitted to probate and record in said probate court was not the last will and testament of Emanuel Beare, deceased, without specifying any ground or reason why the same was not such last will and testament.

An answer was filed, denying the averments of the petition, and alleging as a special defense that by the terms of such will, as probated, Solomon E. Spangler was given a legacy of \$4,000, which legacy, with its accumulated interest, had been received by him from the defendant, Jasper C. Beare, as executor of the will of said Emanuel Beare, deceased, and who had thereupon receipted for the same in full settlement of all his rights under such will as a legatee.

To this answer a reply and an amended and a supplemental reply were filed, the effect of which was to tender back to the said executor the amount of money received by the plaintiff,

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who admitted its receipt, but who claimed that such acceptance was procured by fraud and misrepresentation of the other defendants named in the proceedings, which money, however, the executor refused to receive, when the same was deposited with the clerk of courts as a tender for that purpose.

The question presented to the jury for determination was whether or not the testator, Emanuel Bearé, had executed another and subsequent will to the one that had been admitted to probate, by the terms of which the former will had been revoked, and that the same had never been republished as and for his last will, and the same was therefore void.

Numerous errors as to the admission and rejection of testimony were insisted upon in this court. Also it is urged that the court erred in its charge to the jury, by which the plaintiff was prevented from having a fair trial. We have examined the entire record with reference to the assignments of error presented by the petition in error, and we are of the opinion that in the charge of the court there was error which was misleading to the jury and prejudicial to the rights of the plaintiff in error. The court charged in substance, and it is to be found on page 7 of the charge or 145 of the bill of exceptions, that if the jury find that plaintiff had accepted the \$4,000, and that such acceptance was not brought about by fraud and misrepresentation of the executor but was accepted by plaintiff without such fraud and misrepresentation that that would be the end of the case. Further, that the jury need not go into any further questions because the mere acceptance of the legacy under the will would bind plaintiff from making any contest in the court of common pleas at all. This court is of the opinion that this proposition is not the law in Ohio when applied to a legacy or gift of personal property, but is applicable only when the gift or device is a gift of real estate. We are of opinion that such acceptance of a legacy could be revoked and the money returned, whereupon the rights of the legatee to contest the will would stand just as though no such payment had ever been made and we think that this charge is such error that the judgment of the court of common pleas should be reversed.

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We have examined the whole record with reference to the other errors assigned and we find that while there may have been other errors, yet we could not feel called upon to reverse the judgment upon them alone and especially as the one specified is in our opinion sufficient to justify a reviewing court to reverse such judgment.

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### MORTGAGES.

[Hamilton (1st) Court of Appeals, July 19, 1915.]

Jones, Jones and Gorman, JJ.

AMELIA SCHELL V. MATHILDA BERNHARD ET AL.

**Accepting Mortgage from Heirs does not Waive Priority of Claims against Estate.**

The holder of a claim against the estate of a decedent does not, by accepting a mortgage executed by the heirs, waive his priority over previous mortgages by the heirs in so far as these mortgages were given to secure money borrowed to pay off general creditors of the estate, where the subsequent mortgage contains a recital disavowing any intention to waive such priority.

APPEAL.

*Morse, Tuttle & Harper and Black, Swing & Black*, for Southern Ohio Co.

*Johnson & Levy*, for Western & Southern Insurance Co.

*Kramer & Bettman*, for the Alms & Doepke Co.

JONES, E. H., J.

This is an action for partition of real estate left to Karl Romer, deceased. Action was brought by the plaintiff, Amelia Schell, daughter of said Karl Romer, against the other surviving children, the Alms & Doepke Company, the Western & Southern Life Insurance Company, the Southern Ohio Savings Bank Company, et al.

There is no controversy among the heirs as to their respective shares in the realty. The issues drawn by the pleadings and upon which the case was appealed to this court are between

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the mortgagees, the same being the Western & Southern Life Insurance Company, the Southern Ohio Savings Bank Company and the Alms & Doepke Company, all of whom hold mortgages upon the property which bear date subsequent to the death of said Karl Romer and were executed by his widow and children. At the time of the death of Karl Romer he owed a considerable sum of money to the Alms & Doepke Company. The two other mortgagees at that time held mortgages on the real estate herein partitioned. The subsequent mortgages to them were given to secure loans which embraced the sums due upon the former mortgages and also additional sums in each case procured by the heirs to pay off the indebtedness of the estate. It was fifteen months or more after the death of said Karl Romer, and some time after these mortgages were given, that the mortgage to the Alms & Doepke Company was executed and delivered by the widow and next of kin to secure the payment of the debt owing to said company by decedent.

The question we are called upon to decide is whether or not the Alms & Doepke Company, by accepting this mortgage, waived the priority of its claim against decedent's estate in favor of the other two mortgagees. No question is raised by the Alms & Doepke Company as to the priority of their mortgages in so far as they represent money advanced to take up and cancel mortgage loans existing at Karl Romer's death. But as to the additional loans represented by said two mortgages, advanced as aforesaid for the payment of general claims, it is claimed that the lien of the Alms & Doepke Company has priority.

We must be content in this decision to thus briefly state the issue that we are called upon to decide, and more briefly state the conclusion which we have reached.

The mortgage deed, given to the Alms & Doepke Company as aforesaid, in addition to the usual provisions contains the following recital:

"It being understood and agreed that the Alms & Doepke Co. by the acceptance of this mortgage does not admit the priority of said mortgages of the Southern Ohio Savings Bank



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Company and the Western & Southern Life Insurance Company, except in so far as the two mortgages were given to take up mortgages made by said Karl Romer in his lifetime."

And it also names the following consideration:

"In consideration of one dollar to them in hand paid by the Alms & Doepke Company, and in further consideration of the Alms & Doepke Company forbearing to proceed against said real estate of Karl Romer, deceased, to satisfy said claim, as hereinafter provided, and for other good and valuable considerations," etc.

The amount secured by this mortgage, to-wit, \$4,581.17, was made payable in three annual equal installments due in one, two and three years from date, respectively.

It is earnestly contended by the attorneys for the prior mortgagees that by extending the time of payment of its claim, and the acceptance of the mortgage and by forbearing to press its claim for collection, the Alms & Doepke Company has waived the priority which the law gives to its claim, and is estopped to assert such priority as against the two mortgages which are prior in point of time of execution and record.

We take it as elementary that there can be no waiver of a right unless same is expressed by word or in writing, or unless the acts and conduct of the party have been such that a waiver will be presumed. It is not claimed that there has been any express waiver on the part of the Alms & Doepke Company, but a great deal has been said in argument and by brief in support of the latter alternative, viz., that the waiver is to be presumed in this case by the acceptance of the mortgage and extension of time of payment, etc., provided therein.

Numerous cases are cited by counsel on both sides to show when and under what circumstances a waiver is or is not to be presumed. These cases have been examined, together with other authorities upon the subject, and we have yet to see a single case where a court has deigned to discuss the presumption or nonpresumption of a waiver, or the question of estoppel, where the instrument in question, or the language

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used, contained statements expressly disclaiming any intention to waive, as does this Alms & Doepke Company mortgage.

It might well be contended as between the parties to this mortgage, that the mortgagee has by its acceptance delayed its right to enforce its claim or lien. In fact, the language of the instrument, as above quoted, shows that the Alms & Doepke Company was to forbear in the enforcement of its claim. This only draws our attention to the distinction between the right of a lien, and the right of enforcement of a lien. The later question is not involved in this case. All of the lien holders were brought into this partition proceeding as defendants and have filed answers asking for the protection of their rights. The nature of the proceeding and the consequent partition of the property requires a satisfaction of these liens. The action was brought by one of the very persons in whose favor the Alms & Doepke Company agreed to forbear and neither she nor any of her comortgagors are complaining or interposing any objection to the priority claimed by the Alms & Doepke Company.

In conclusion we will only state that we can not see how these other mortgagees can be heard to complain or to claim any right or benefit to be derived by reason of a subsequent transaction about which they knew nothing, and to which they were not parties. The parties to the Alms & Doepke mortgage all expressly agreed that no right of the company should be deemed waived thereby. We find no authority that will enable the Insurance Company or the Savings Bank Company to derive any benefit or occupy any better position by reason of this transaction. It must be conceded that it was not within the power of the parties to the Alms & Doepke mortgage to impair the rights of the other mortgagees. How, then, can it be maintained that the transaction could inure to their benefit? We are of the opinion that the purpose of the Alms & Doepke mortgage was to induce the company to forbear to proceed against the real estate. That agreement and that purpose in no way affected

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the rights of the other mortgagees. Any intention to waive was expressly disclaimed.

So far as the mortgages given to the Savings Bank Company and the Insurance Company cover moneys not used for taking up decedent's mortgages, they are held to be inferior and subject to the Alms & Doepke lien.

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**CONTEMPT—MUNICIPAL CORPORATIONS—PUBLICATION.**

[Wayne (5th) Court of Appeals, September Term, 1914.]

Voorhees, Shields and Powell, JJ.

**MASSILLION ELEC. & GAS CO. v. ORRVILLE (VIL.).**

**1. Municipality Having Granted Franchise to Electric Light Company Cannot Construct Municipal Plant Without Purchase or Condemnation of Private Plant.**

Section 3990 G. C., relating to the erection or purchase by municipalities of gas and electric light works, is not repealed by Art. 18, Sec. 5, of the constitution, providing for the acquirement, construction, owning, leasing and operation by municipalities of public utilities; hence, a municipality having failed to purchase or condemn the property of an electric light company having a franchise from the municipality, cannot issue and sell bonds in anticipation of its construction and operation of a municipal light plant.

**2 Ordinance for Issuing Municipal Light Bonds of General Nature and Publication in One Newspaper Insufficient.**

Ordinances for the issuing and sale of bonds for a municipal light plant are of a general nature and come within the provisions of Sec. 4227 G. C., which are mandatory and jurisdictional in requiring them to be published in two newspapers of opposite politics; hence, publishing such an ordinance in one newspaper only is insufficient.

**3. Publication of Ordinances by Posting not Evaded by Publication in One Newspaper When Two Newspapers Required.**

The provision of Sec. 4229 G. C., relating to publication of ordinances, requiring posting of copies, is not limited to municipalities having no newspaper; where the matter is jurisdiction; it cannot be implied that no other publication than one of the two methods mentioned is a compliance with the requirements of the statute.

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**4. Perfecting Appeal Suspends Order Dissolving an Injunction.**

Filing an appeal bond and perfecting the appeal suspends the order dissolving an injunction leaving the original injunction in full force.

**5. Advice of City Solicitor not Defense to Municipal Officers Violating Injunctions.**

Municipal officials violating an order enjoining them from certain official acts cannot offer the defense that they acted upon advice of their legal counsel, a city solicitor, such fact may be used in contempt proceedings in mitigation of the violation but not in defense of their violation.

## APPEAL.

*Kratsch & Maier, J. B. Taylor and T. W. Orr, for plaintiff.*

*Clyde Merchant, city solicitor, G. A. Starn and F. F. Taggart, for defendant.*

## PER CURIAM.

These two cases are in this court by appeal from the judgment of the court of common pleas, the plaintiff in each case being the appellant.

In case No. 637, the plaintiff filed its petition alleging that it was the owner of an electric light plant in the village of Orrville, this county, and that the defendant, the village of Orrville, by its duly elected officers, was about to erect a municipal light plant in said village; that certain preliminary legislation had been had by the council of said village authorizing the issuance and sale of bonds and otherwise preparing to construct and operate an electric light plant in said village. A temporary injunction was allowed in the court of common pleas where the cases were heard upon their merits resulting in a dismissal of the petition in each case.

The judgment of this court, which is in favor of the plaintiff in each of said actions, is based upon two distinct grounds:

First, that the provisions of Sec. 3990 G. C. are in full force and effect, not having been repealed by the adoption of the amendments to the constitution, and that the provisions of this section providing for the sale of an electric light plant in villages to the municipality, have not been complied with, and,

Second, that the facts upon which the said village of Orr-

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ville would have the right to exercise the jurisdiction claimed do not appear by the record.

It is contended on the part of the defendants, that the provisions of Sec. 3990 G. C. which require that councils of a municipality intending to erect a municipal electric light plant at the expense of the corporation, or purchase any electric light works already erected by any person, company or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, "the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein," "and that if the council and owner or owners of said electric works cannot agree upon the compensation to be paid therefor, the council may file in the probate court of the county where said electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings shall be had of appropriation as is provided for the appropriation of private property by a municipal corporation, were repealed by the adoption of the recent amendment to the constitution."

The petition in case No. 638 contains the necessary averment, that the plaintiff is the owner of said electric light works in the village of Orrville under franchise granted by said village. No defense is made that the franchise has terminated. But it is claimed that the provisions of Sec. 3990, above quoted, are in conflict with the provisions of the amended constitution relating to municipalities and especially in conflict with Art. 18, Sec. 5 of the constitution as amended.

We are of the opinion that there is no conflict between Sec. 5 or Art. 18, nor with any other section of said Art. 18, and the said Sec. 3990; that this section of the statutes is in full force and effect, and that the defendant, the village of Orrville, having failed to either purchase or condemn the property of the plaintiff, its action is without authority of law and the injunction allowed should be made perpetual.

The second ground upon which the court is authorized to render judgment for plaintiff, is that, the ordinances of the vil-

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lage of Orrville providing for the issuing of bonds and the sale of the same, were not passed as required by law. We think that these ordinances are ordinances of a general nature and provide for public improvements and that therefore they come within the provisions of Sec. 4227, which provides, among other things: "Ordinances of a general nature or providing for improvements, shall be published as hereinafter provided before going into operation." We think this provision is jurisdictional. That when the council fails to pass such ordinance in the manner prescribed by the statutes, it is without jurisdiction to proceed further with the matter in hand, in this case, the erection of an electric light plant for the village of Orrville. It is provided in Sec. 4226:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be."

And it is further provided by Sec. 4229:

"Except as otherwise provided in this title, in all municipal corporations the statements, ordinances, resolutions, orders, proclamations, notices and reports required by this title, or the ordinances of a municipality to be published, shall be published in two newspapers of opposite politics, of general circulation therein, if there are such in the municipality."

It will be noticed that the provisions are mandatory. Therefore they must be strictly complied with in order to give the council jurisdiction to proceed in the construction of an electric light plant.

It appears by the record that the ordinances of said village and resolutions when published were published in but one newspaper, The Orrville Courier Crescent, and not in two newspapers, as required by these statutes. It does not appear what the politics of the Orrville Courier Crescent is, whether democrat or republican, or of some other political affiliation.

It is a well settled rule in Ohio that inferior tribunals must comply strictly with the statutes giving jurisdiction until such jurisdiction has been acquired. Perhaps there are many things that may be done after jurisdiction attaches that are not in

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strict compliance with statutory provisions, but every statutory provision that relates to jurisdiction or the right of the corporation to act, must be strictly conformed to. There are but two methods of ordinance of a general nature and providing for improvements mentioned and provided for in the statutes.

They are by the provisions of Sec. 4229, by publication in two newspapers of opposite politics of general circulation in said municipality, if there are such, and if there are none such, and no newspaper published in said municipality the notice may be given by posting copies thereof at not less than five of the most public places in the corporation for a period of not less than fifteen days.

It may be contended that because this provision only applies to municipalities where no newspaper is published that, by implication, publication could be had in one newspaper where such paper was published in the municipality. We do not think that where the matter is jurisdictional anything of the kind can be implied, and that no other publication than one of the two methods mentioned is a compliance with the requirements of the statute.

This has been held by other courts in the state and was held by this court to be the law in an action before it, for the improvement of a public street in one of the villages of Muskingum county, Ohio.

For the two reasons mentioned the judgment will be rendered in favor of the plaintiff in each of said cases, Nos. 637 and 638. In case No. 638 the action was by the plaintiff as a taxpayer in which it asks to enjoin the expenditure of the moneys raised by the sale of bonds for the purpose of constructing an electric light plant in said village. This action is authorized by law to be brought by a taxpayer in certain cases. The averments of this petition bring the action within the statutory provision permitting such actions to be so brought. We think the testimony sustains the averment of the petition in this action and that the defendant should be enjoined from proceeding with the erection of such plant. It should be sustained on account of the invalidity of the proceedings of the

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council, both in the passage and in the publication of the ordinances set out and described in the petition, and because the provisions of the statutes relating to the construction of such improvements had not been compiled with.

If motions for a new trial are filed in either or both of said cases they will be overruled. Exceptions may be noted, and each of said cases will be remanded to the court of common pleas for execution.

## CONTEMPT (SEPT. TERM 1914).

In case No. 638 an application was made that several of the defendants named should be cited to show cause why they should not be proceeded against for contempt of court in violation of the injunction allowed in the court of common pleas in that they proceeded in doing the things for which they were enjoined immediately after said injunction was dissolved in the court of common pleas, which was done upon the hearing of the case on its merits, and before the perfection of an appeal by the plaintiff in the court of appeals.

The statutes provide that an appeal may be perfected upon the dissolution of an injunction within ten days, and that the court dissolving said injunction may suspend its order of dissolution for ten days, to allow such appeal to be perfected. This, however, was not done in this case. The dissolution of the injunction was entered as the order of the court on May 21, 1914, and the appeal bond was filed on May 26, 1914. Between these two times certain contracts, that the village had entered into for the purpose of erecting an electric light plant, were changed and a large amount of money was paid or agreed to be paid in the construction of the said plant pursuant to such change in the contract. Some of these changes were made after the appeal bond had been filed in this court, thereby perfecting the appeal.

It is contended that the filing of an appeal bond did not renew the order of injunction that existed in the court of common pleas before the dissolution of such an order. This court



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is of the opinion that the filing of an appeal bond and the perfecting of an appeal suspends the order of the court of common pleas dissolving the injunction and thereby leaves the same in full force. This was held by the district court of Hamilton county in the case of *Caldwell v. High*, 6 Dec. Re. 1037 [9 Am. L. Rec. 692], and the judgment of that court was affirmed by the Supreme Court. The statute exists in practically the same form as it existed when this decision was made, and we hold that from as it existed when this decision was made, and we hold that from and after the filing of the appeal bond the injunction allowed in the court of common pleas was in full force, and we find from the evidence that the different defendants charged with violating the order of injunction did violate the same. And while they claim that such violation was upon the advice of their counsel, the city solicitor, we think that is not a defense, although it may be considered in mitigation of the actions of the defendants in violating said injunction.

It is the judgment of the court that the charges against the defendants named constituting the board of public affairs in said village, together with H. D. Shannon, one of the contractors of said village, are sustained, and that each of them should pay a fine of \$25, together with an equal share of any costs made in such proceedings in contempt.

Motion for a new trial, if one is filed, will be overruled and exceptions may be noted.

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## CHARGE TO JURY.

[Hamilton (1st) Court of Appeals, 1915.]

Jones, Jones and Gorman, JJ.

GEORGE C. BUTTEMILLER v. HOWARD WILLIAM SCHMID, HIS  
NEXT FRIEND.Defendant Cannot Complain of Instruction on Burden of Proof  
Prejudicial to Plaintiff, Only.

An instruction that "by burden of proof is meant the burden or duty of satisfying the minds of the jury of the truth of all the material facts alleged by the plaintiff and denied by the defendant," too great a burden is imposed upon the plaintiff, but being prejudicial to the plaintiff only the defendant can not complain of the error so committed.

*Robertson & Buchwalter*, for plaintiff in error.*Jos. Lemkuhl*, for defendant in error.

JONES, E. H., J.

Plaintiff in error is a physician against whom judgment was recovered in the court below in favor of defendant in error for the sum of \$1,000, assessed by the jury as damages for malpractice in connection with the treatment of plaintiff for an injury.

By far the greater part of the brief for plaintiff in error, as well as the oral argument of counsel, is devoted to a discussion of the evidence. We deem it unnecessary to review the evidence in this opinion. It is sufficient to say we do not feel at all inclined to disturb the verdict of the jury or the judgment entered thereon for insufficiency of evidence to support it.

The other errors alleged relate to the charge of the court. Complaint is made of the following portion of the charge:

"By burden of proof is meant the burden or duty of satisfying the minds of the jury of the truth of all the material facts alleged by the plaintiff and denied by the defendant."

The case of *Cincinnati, H. & D. Ry. v. Frye*, 80 Ohio St. 289 [88 N. E. Rep. 642; 131 Am. St. Rep. 709], is cited as authority to show that the word "satisfying" as used in this

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portion of the charge is prejudicial to the plaintiff in error. In the case cited it appears that the word "satisfied" was used by the trial court in its charge in connection with the attempt of the defendant to establish the defense of contributory negligence. Crew, C. J., in his opinion, on page 300, said:

"By this instruction the jury was told, not only that the burden of proof was on the defendant to establish its affirmative defense of contributory negligence by a preponderance of the evidence, but that if the defendant was negligent as charged, then plaintiff was entitled to a verdict 'unless the defendant has so made out the truth of its affirmative defense.' And the jury was thereby further told and instructed that such affirmative defense was so made out, 'If the defendant has satisfied your minds by a preponderance of the evidence \* \* \* that the plaintiff was guilty of negligence which contributed directly and proximately, together with the alleged negligence of the defendant, to produce this injury.' This instruction, therefore, in effect, imposed upon the defendant the requirement—if it would make available the defense of contributory negligence—that it establish by a preponderance of the evidence the truth of such defense to the satisfaction of the jury. This was to place upon the defendant the obligation and burden of producing or furnishing a higher degree of proof than the law demands or exacts, and was therefore erroneous."

In the case now under consideration the court in the portion of the charge in which the word "satisfying" is used erred not against the plaintiff in error, but to the prejudice of the defendant in error, upon whom too great a burden was imposed. It therefore follows that such error constitutes no ground for reversal in this case, as it did not result prejudicially to the party complaining.

The word "satisfy" was also used by the trial court in its charge on page 294 of the bill of exceptions, where the court charged the jury upon the doctrine of contributory negligence. This portion of the charge was later entirely recalled by the court, and the jury was instructed to pay no attention whatever to that part of the charge.

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Our attention is also directed, by plaintiff in error, to the following language of the court:

"You have a right to accept or reject part or all of the testimony of a witness, and give credit to those witnesses, who in your opinion are entitled to credit."

*Pittsburg, C. C. & St. L. Ry. v. Pritz*, 90 Ohio St. 419, is relied upon in support of this assignment of error. The language there passed upon is not the same as the language here used. When considered in connection with the portion of the charge which immediately precedes it, we do not think that this portion of the charge is erroneous.

We therefore find no error in the proceedings below and the judgment will be affirmed.

Jones and Gorman, JJ., concur.

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**CARRIERS—STREET RAILWAYS.**

[Hamilton (1st) Court of Appeals, June 14, 1915.]

Jones, Jones and Gorman, JJ.

CINCINNATI TRAC. CO. v. WILLIAM BURKHARDT.

**1. Starting Street Car Before Passenger Seated not Negligence per se.**

To start a street car before a passenger who has just stepped upon the car has had time to be rated, is not negligence per se.

**2. Carrier's Care of Passenger is Highest Degree Used by Ordinarily Careful Persons Under Like Circumstances.**

The degree of care required of a carrier toward a passenger is not to be measured by the care which would be exercised under similar circumstances "by very careful and skillful employees," but it is the highest degree of care which ordinarily careful and skillful persons would use under like circumstances.

**3. Care Required of Crippled Passenger.**

To charge that a passenger in a crippled condition was bound to exercise "greater care" than others, is erroneous, but the jury should be instructed that in determining whether he exercised ordinary care they should consider his crippled condition and any burden or impediment to his movements arising therefrom.

**Traction Co. v. Burkhardt.****ERROR.**

*Kinkead & Rogers*, for plaintiff in error.

*Cogan, Williams & Ragland* and *Thos. L. Michie*, for defendant in error.

**JONES, E. H., J.**

This action was brought in the common pleas court by the defendant in error against the plaintiff in error for damages by reason of injuries received by him while boarding a car of the traction company.

The complaint in the petition was that the car was started with a sudden jerk, while plaintiff was in the act of boarding it and before he had reached a seat in the car, causing him to be thrown to the street and severely injured. The charge of negligence was denied by the traction company in its answer, which also contained an allegation of contributory negligence on the part of plaintiff. The jury returned a verdict in favor of the plaintiff for \$3,000, which the trial court reduced to \$2,000, for which sum judgment was rendered in the court below.

A number of errors are assigned in the petition in error and urged by counsel in oral argument.

The first alleged error upon which we deem it necessary to comment in this opinion relates to a portion of the general charge of the court, as follows:

"If you find that the defendant was not negligent, you need go no further, but must bring in a verdict for the defendant. If you find that the defendant was negligent in suddenly starting the car without notice, before the plaintiff had the opportunity to be seated, and that such negligence was the direct cause of the injury to plaintiff, you will bring in a verdict for the plaintiff unless you find that the plaintiff was also negligent, and that his negligence operating concurrently with the defendant's negligence, if any, directly contributed as a cause of the accident."

It is claimed that the court erred in the use of the language "if you find that the defendant was negligent in suddenly start-

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ing the car without notice, before the plaintiff had an opportunity to be seated," etc. It is not negligence *per se* to start a street car before a passenger is seated therein. The objection made to this charge, which we think is well founded, is that it implies that the defendant company in this case was negligent if its employees started the car in question before plaintiff had reached a seat. Nowhere in the general charge do we find any explanation of this language or any language which could be construed as a refutation of the implication to which it is susceptible. It may be, and it is quite probable, that the learned judge did not intend to convey to the jury an instruction to the effect that the starting of a car while a passenger was yet unseated is negligence. It was, however, charged in the petition as one of the grounds of negligence that the car was so started, and a fair interpretation of the language used by the trial court would lead the jury to believe that if they found that the car was started before Burkhardt had an opportunity to be seated that the company would be guilty of negligence. This is not the law, and the question having been raised by the pleadings and the evidence it was incumbent upon the court to charge the jury clearly upon this matter, and its failure so to do was in our opinion prejudicial error.

The next alleged error considered is also based upon the language of the court in its general charge as found on page 111 of the bill of exceptions, as follows:

"The defendant is a common carrier of persons, but as such does not insure its passengers against all hazards incident to their transportation.

"It is required to exercise through its servants, such as the conductor and motorman, a very high degree of care, skill, diligence and foresight, such as is and should be exercised by very careful and skillful railroad employees under similar circumstances, to avoid injury to those whom it carries as passengers."

We are of the opinion that this incorrectly states the degree of care required of those in charge of the car even to a passenger. and that, too, to the prejudice of the defendant company. The

## Traction Co. v. Burkhardt.

degree of care required of a carrier towards a passenger is not to be measured by the care that would be exercised under similar circumstances by very careful and skillful employees. The correct rule, it seems to us, is that the carrier owes to the plaintiff the highest degree of care which ordinarily careful and skillful persons would use under similar circumstances. If the rule laid down by the trial judge were the correct one, then all carriers of passengers would be required as a matter of self-protection to employ only "very careful and skillful" men. The rule laid down by the trial court in this case could not be observed by any other kind of men, and the carrier would therefore be liable unless the servants or employees connected therewith were very careful and skillful men.

The next alleged error urged by counsel is based upon the refusal of the court to give special charge No. 2:

"If you find that the plaintiff's right hand was crippled by the loss of two fingers, and that when he boarded the car his left arm was incumbered by one or more bundles, I charge you that under such circumstances it was the duty of the plaintiff to exercise greater care for his safety than would have been demanded of him had his right hand not been crippled and had he been free from bundles or packages."

We think that the court was correct in refusing to give this charge. The words "greater care" as used in the charge requested are misleading and not permissible. The plaintiff was required to exercise ordinary care, and if a special instruction as to his duty was deemed necessary by counsel it should have been to the effect that in determining whether plaintiff exercised ordinary care the jury should consider his crippled condition and any burden or impediment to the free use of his arms or hands which may have been present in the case.

The other ground of error to which our attention has been especially called is that designated by counsel for plaintiff in error as "misconduct of the plaintiff in the trial below." Briefly stated this charge is based upon the claim of plaintiff in his petition and during the trial that prior to this accident he was an able-bodied man, never sick, and always able to work;

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and that after the verdict of the jury was returned it was first ascertained by counsel for the traction company that this same plaintiff had, several years before, been injured while in the employ of a printing company in this city, and had brought an action for damages against said printing company alleging in his petition in that case that he was by said injury so received by him, made sick, feeble and permanently disabled. We do not deem it necessary to enter at length upon a discussion of this point since from the view we take of the case it must be reversed on other grounds and remanded for a new trial. There seems to be no question of the relevancy of the evidence, and we deem it unnecessary to say anything further about it.

For the reasons given, the judgment will be reversed and the cause remanded to the court of common pleas for a new trial.

Jones and Gorman, JJ., concur.

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COURTS.

[Columbiana (7th) Court of Appeals, April 8, 1915.]

Houck, Pollock and Metcalfe, JJ.

(Judge Houck of the 5th district sitting in place of Judge Spence.)

\*JOHN H. SMITH v. GEORGE FRESHWATER ET AL.

**Effect of Objection to Jurisdiction Not Destroyed by Subsequent Answer on the Merits.**

Where a defendant has interposed by motion an objection to the jurisdiction of the court over his person, he does not upon the overruling of the motion submit to the jurisdiction by filing an answer in which he challenges the jurisdiction of the court in the first defense and in a second defense answers to the merits of the cause.

[Syllabus by the court.]

**ERROR.**

*W. F. Lones and Geo. T. Farrell, for plaintiff in error.*

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\*Motion to certify record overruled, *Smith v. Freshwater*, 60 Bull. 308.



## Smith v. Freshwater.

*Billingsley, Moore & Van Fossan and Hughes & Tipplehorn*, for defendants in error.

## HOUCK, J.

The parties to this case stand here in the same relation to each other as in the court below. The plaintiff brought suit in the common pleas court of this county against the defendants, claiming damages from them in the sum of \$5,000, as the result of injuries and damages to a vein of coal belonging to plaintiff. Summons was issued for all of the defendants, but was only served upon two of them. The defendants, George Freshwater, Lee Freshwater, Philip Freshwater, Milton Freshwater and Elmer Freshwater, were not served with summons. Their attorney appeared and filed a motion solely and wholly for the purpose of attacking the jurisdiction of the court over their person and asked that the summons be quashed. Why the motion was filed we do not know, and the record does not disclose. They then filed an answer, setting up two defenses: First, attacking the jurisdiction of the court over their person; second, answering to the merits of the cause set out in the petition of plaintiff. The cause was heard, and the action was dismissed as to them, and to their dismissal the plaintiff excepts.

The only question to be determined is, whether by answering in the first defense in which they challenged the jurisdiction of the court, they submitted themselves to the jurisdiction of the court, by interposing a second defense in which they answered to the merits of the cause? We think not.

In support of the view of the court in this case, we desire to call counsel's attention to the case of *Long v. Newhouse*, 57 Ohio St. 348, 368 [49 N. E. Rep. 79]. We might say, in the first place, as the court views it, he who attempts to invoke the authority that a court has no jurisdiction over his person, must do so at the very beginning of the case, and continue it until the end. In other words,

"It must be at the very threshold of the defendant's appearance to the action. The reason is a plain one. If a party may at the same time invoke the jurisdiction of a court on the

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merits of an action, and deny its jurisdiction over his person it would work great injustice."

The court here, in distinguishing and passing upon the case in *Allen v. Miller*, 11 Ohio St. 374, 376, and also in *Evans v. Iles*, 7 Ohio St. 234, say:

"He could under such practice, if the judgment on the merits is in his favor, avail himself of it as a bar to another action, but if it should be against him, he could set it aside for want of jurisdiction of his person. Hence it is said, that 'if a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.' In *Allen v. Miller*, *supra*, the court is careful to observe that Miller embraced the first occasion which offered, to-wit: in his answer to assert his objection to the jurisdiction of the court; and distinguished the case from that of *Evans v. Iles*, *supra*, where the defendant had previously filed a demurrer, and, although withdrawn had, as the court held, subjected the defendant to its jurisdiction. And, commenting on the withdrawal of the demurrer, the court said: 'It ceased to be of any consequence in the case, but as a fact, the evidence of which was indelibly fixed on the journal of the court, and constituting of itself an appearance in the case, it was as significant and as operative after the demurrer was withdrawn as it was before.' "

Therefore, in the case at bar, the defendants in question interposed an objection to the court's jurisdiction over their person. And after the motion was overruled, filed an answer, and in the first defense again challenged the jurisdiction of the court over their person; and we think that having pursued this from the beginning until the end the court was without jurisdiction over the person.

We therefore find no error in the record, and the judgment of the court below is affirmed.

Pollock and Metcalfe, JJ., concur.

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## GUARDIAN AND WARD—NEGLIGENCE.

[Hamilton (1st) Court of Appeals, February 28, 1914.]

Swing, Jones and Jones, JJ.

JOHN F. NOLAN V. SOPHIA HABERER ET AL.

1. Testimony of Party in Personal Injury Case Against Guardian for Insane Party Appointed After Happening of Injury Complained of is not Competent.

One who is injured through the negligence of employees of the insane owner of the business which such employees were engaged in carrying on is not competent, in an action for damages on account of such injuries, to testify against the guardian, if the insanity of the defendant was not officially declared until after the suffering of the injury complained of, notwithstanding such insanity existed theretofore and the facts of the case were not within her personal knowledge.

2. Question of Negligence of Owner Causing Lumber to be Piled in Unimproved Dedicated Street and of Contributory Negligence of Pedestrian Injured by Falling Board, for Jury.

Employees of one who has caused lumber to be piled in a dedicated though unimproved street are bound to exercise a high degree of care to avoid injury to persons who may desire to use the street, and where the evidence is conflicting as to whether the injury to plaintiff by a falling board was due to the negligence of said employees or to his own contributory negligence, the case should be submitted to the jury.

ERROR.

*G. C. Wilson and J. E. Fitzpatrick*, for plaintiff in error.  
*Pogue, Hoffheimer & Pogue*, for defendant in error.

JONES, E. H., J.

This action was brought in the court below by John F. Nolan against Sophia Haberer, doing business as Haberer & Company, and Jacob F. Haberer, guardian of Sophia Haberer, a lunatic, to recover damages for an injury which he sustained in June, 1908, by being struck on the head by a board while passing along Berlin street in the city of Cincinnati, which board was being removed from a pile of lumber in Berlin street owned by the defendant Haberer & Company. Two employees of Haberer & Company were taking lumber from this pile, one

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being upon the lumber pile and the other standing on the street. The lumber was being placed on a wheeled truck, which was on the street, for the purpose of wheeling it into the factory. The end of a stick of lumber struck plaintiff on the head causing severe injuries to him.

Berlin street is a public street of the city of Cincinnati, but has never been improved. It is partly filled and is open for wagon and pedestrian travel. There is a short sidewalk from Gest street south, but it does not extend as far south as the place of the accident, and people drive over the street principally for service to the factories that are built along it, and pedestrians use it between Gest and South street.

It appears also that defendant had been in the habit of storing lumber upon this street and that the east part of it was occupied by lumber piles where the surface of the street permitted; that there was a lumber pile against the building of Haberer & Company on the west side of the street where the accident occurred, and the traveled roadway was between this lumber pile, which extended six or seven feet into the street, and the lumber pile from which the board that caused the injury was taken. The truck upon which the lumber was loaded was about three feet wide and was placed about five to seven feet west of the lumber pile from which the lumber was being taken and about four feet east of the lumber pile which was at the west edge of the street. Plaintiff was walking southwardly from Gest street.

The petition alleges that the injury occurred June 8, 1908, through the neglect of the defendant and without fault on the part of the plaintiff.

The defendant Jacob Haberer filed an answer admitting that he was the guardian of Sophia Haberer, a lunatic, and was appointed as such subsequent to the time of the accident, and admitting the ownership of the plant of Haberer & Company by said lunatic, and that it was operating a manufacturing establishment fronting on Evans and Summer street and extending through to Berlin street, and denied the other allegations of plaintiff's petition; and for a second defense pleaded that

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plaintiff was guilty of contributory negligence in that he "deliberately put himself in a place of danger and negligently and carelessly persisted in continuing to walk along said unimproved Berlin street, on which there were lumber piles where passage was so difficult, and easily visible to the plaintiff, and when by passing only a short distance around the corner in another direction he could have avoided any danger, and notwithstanding that knowledge the said plaintiff took no measures of any kind to avoid being struck or injured by the board referred to in the petition of the plaintiff herein."

And for a third defense defendant says that if plaintiff was in any manner injured by any act of defendant or her agents, servants or employees, that said injury was caused wholly by his own negligence and carelessness and without fault, neglect or carelessness of her servants, agents or employees.

Plaintiff was offered as a witness in his own behalf, and objection was made to his competency as a witness under Sec. 11495 G. C. The court sustained the objection and refused to permit him to testify as to the circumstances of the accident. Exception was taken to this exclusion as a witness, and this is urged as one of the errors relied upon by plaintiff in error in this proceeding.

This ruling of the trial court excluding plaintiff's testimony as to facts occurring prior to the appointment of a guardian must be sustained. The circuit court of this circuit has ruled upon this question in a case involving the same defendant, *Ransom v. Haberer*, 32 O. C. C. 592 (13 N. S. 511). This case was affirmed by the Supreme Court without report, and while it is argued that the circumstances of that case differed from those of the instant case because the evidence shows that the insanity of Sophia Haberer existed long before the accident, still the legislature have seen fit to allow only facts which occurred after the appointment to be testified to by the party opposed to such guardian, and the date of the appointment must therefore control.

If this were a new question the court might be disposed to

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hold that the qualifying words found in this section, "when a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principles shall be applied," might permit plaintiff to testify in a case of this character where the facts are wholly outside of the personal knowledge of the insane person—the business having been carried on entirely by others long before her incapacity had been officially declared by any court and a guardian appointed for her. For a discussion of this question, see the case of *Cochran v. Almack*, 39 Ohio St. 314, and the dissenting opinion of Okey, J., on page 318.

At the close of plaintiff's evidence the court granted defendant's motion for an instructed verdict. Upon this verdict judgment was entered for defendant, and this is the principal error remaining upon which plaintiff in error relies for a reversal of the judgment below.

The petition contains but one charge of negligence against the defendant, viz., that her employees carelessly dropped a board from said lumber pile which struck the plaintiff upon his head while he was lawfully walking along and upon said street. It seems to us that there can be no doubt that this states a good cause of action. It follows that if there is any evidence tending to support the allegation, the question of the negligence of the defendant and the contributory negligence of the plaintiff, which is raised by defendant's answer, were questions which should have been submitted to the jury for its determination. No question is raised by the record as to the plaintiff having been lawfully upon the street at the time. It was a dedicated street, and the fact that it had never been regularly improved did not change the rule as to the right of any pedestrian who saw fit to pass along that street. There is nothing in the record to show that the defendant had any authority to store her lumber upon the public highway, and while it may not have been necessary to show authority for such use of a public street by defendant, she is not in any way relieved from her obligation to so use the public highway in handling her lumber as not

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to interfere with or injure any pedestrian or other person who might lawfully be upon the street.

The testimony of the principal witness, the man upon the lumber pile, who undertook to detail the manner of the accident, is in itself somewhat conflicting. The trial judge in his charge to the jury undertook to give his conclusion as to just how the accident occurred, and accepted certain parts of the testimony of this witness and rejected other parts. In so doing, he clearly usurped the province of the jury.

In discussing this evidence, the trial judge concluded that plaintiff was guilty of contributory negligence, from the fact, as he found it, that he had stooped at the moment the board struck him on the head. As it is natural for anyone to duck the head or move the body, upon seeing the approach of an object like the end of a board waving in the air, this conclusion is hardly justified, and seems to be drawn from the statement of the witness that he expected the plaintiff to pass close to the pile of lumber under the board instead of undertaking to go around the board on one side or the other of the truck upon which the boards were being loaded.

As was stated in the opinion of the court in *Steubenville & W. Trac. Co. v. Brandon*, 87 Ohio St. 187 [100 N. E. Rep. 325], at page 196:

"Such a situation presents a case where different minds might reach opposite conclusions, and thus was a proper case for a jury under proper instructions."

The trial court assumed that the warning word used by the defendant's employee, who was on the ground engaged in the handling of the lumber, was addressed to plaintiff. The evidence did not justify this assumption. It was argued by counsel for plaintiff that this so-called warning might have been considered as addressed by him to his companion on the top of the lumber pile for his guidance in the handling of the lumber, rather than to the plaintiff.

This position taken by the trial court is manifestly based upon the theory that the man handling the lumber had a prior and better right to the use of the street than had the plaintiff,

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and that upon warning being given, it became the duty of the plaintiff to turn back or to wait until defendant's employees saw fit to allow him to pass. This surely can not be the law, and rather are we inclined to the view that it was the duty of the defendant to exercise a high degree of care in preventing injury to anyone in the lawful and customary use of the street.

This therefore, is not a case where the evidence of the plaintiff raised a clear presumption of negligence upon his part without any evidence tending to rebut it, which theory is the only one upon which the action of the court below could be sustained.

As touching facts and the law in this case, we think the following citations are worthy of notice: *Ham v. Railway*, 13-23 O. C. C. 496; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Marietta & C. Ry. v. Picksley*, 24 Ohio St. 654; *Cleveland, C. & C. Ry. v. Crawford*, 24 Ohio St. 631 [15 Am. Rep. 633]; *Cincinnati St. Ry. v. Snell*, 54 Ohio St. 197 [43 N. E. Rep. 207; 32 L. R. A. 276], and the most recent case of *Gibbs v. Girard*, 88 Ohio St. 34 [Ann. Cas. 1914 C, 1082].

For the reasons above stated, the judgment is reversed, and the case remanded to the court of common pleas for further proceedings.

Swing, and Jones, O. B., JJ., concur.



Cook v. Pardee.

### APPEAL—ELECTIONS.

[Ashtabula (7th) Court of Appeals, September Term, 1914.]

Spence, Pollock and Metcalfe, JJ.

H. D. COOK v. I. H. PARDEE.

**1. Date of Service of Notice of Appeal in Election Contest and Date of Service of Notice to Take Depositions Excluded.**

In measuring the minimum time in which depositions can be taken under the provisions of Sec. 5149 G. C., the day of service of notice of the notice of appeal must be excluded and ten days must intervene, excluding the day of service before the deposition can be taken; and if the notice of appeal states a shorter time, the depositions taken by contestant, without the appearance of contestee, should be stricken from the files on motion of contestee.

**2. Mistake in Notice of Appeal Naming Date for Depositions not Jurisdictional.**

A mistake in the notice of appeal in the contest of an election by naming a date for taking depositions less than ten days after the day of service of notice of the contest does not deprive the court of common pleas of jurisdiction of such proceedings.

**3. Dismissal Without Prejudice of Notice of Election Appeal not Bar to Another Appeal Within Prescribed Time.**

Where notice of appeal in the contest of an election is dismissed without prejudice to a new action on motion of contestant a second appeal may be taken by the same contestant within the time fixed by statute.

ERROR.

*H. R. Hill, Frank F. Gentsch and H. E. Starkey*, for plaintiff in error.

*B. F. Perry, J. F. Munsell and A. T. Ullman*, for defendant in error.

**POLLOCK, J.**

The plaintiff, H. D. Cook, and the defendant, I. H. Pardee, were candidates for mayor of the city of Ashtabula at the municipal election held in that city on November 4, 1913.

Upon the canvass of the votes cast at that election, the deputy state supervisors of elections for Ashtabula county delivered

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to the defendant, Pardee, a certificate of election as mayor of said city.

On December 2 of the same year the plaintiff, H. D. Cook, filed with the clerk of the court of common pleas a notice of appeal to contest the election of I. H. Pardee, and on the same day caused notice in writing of such notice of appeal to be served on the defendant, I. H. Pardee.

On December 8, Pardee, appearing for the purpose of the motion only, moved the court to set aside the pretended service for the reason that the pretended service showed upon its face that no notice was served upon said contestee. This motion was overruled, and then the contestee filed a further motion on the ground that prior to the filing of this notice the contestant had filed a notice of contest of the same election, and afterwards dismissed it without prejudice to a new action. This motion was also overruled by the court.

Thereupon the contestee filed a further motion asking that the depositions taken in obedience to the notice of contest be stricken from the files. Upon a hearing this motion was sustained, and the depositions were stricken from the files.

Thereupon the contestee filed a motion to set aside the pretended service of notice on contestee of notice of contest, and to quash said appeal, which was sustained by the court and the proceedings dismissed. The judgments of the court striking the depositions from the files, and setting aside the service of notice and quashing the appeal, are assigned as errors by the plaintiff in error in this action.

Section 5169 G. C. provides that the election of city officers may be contested in the manner provided for the contest of the election of county officers.

Section 5148 provides that the election of county officers may be contested by any elector of the county by appeal to the court of common pleas of the county.

Section 5149 provides for notice of the appeal as follows:

"The contestor shall file a notice of such appeal with the clerk of such court and give notice thereof in writing to the contestee, or leave such notice at the house where he last resided,

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on or before the thirtieth day after the day of election. The notice shall state the grounds of contest and the names of two justices of the peace before whom depositions will be taken, and the place, and a time not less than ten days nor more than twenty days from the day of service thereof, where and when such justices will attend and take the depositions."

Referring now to the error complained of in striking the depositions from the files, the contestee claims that the date named in the notice of contest was less than ten days, as required by the provision of the above section. Notice of the contest was filed with the clerk of court, and service thereof was made on December 2. This notice provided that the depositions should be taken on December 12. It is urged that this was less than the ten days' time provided by statute. It will be observed that the statute provides that the depositions shall be taken not less than ten days from the day of service thereof.

The Supreme Court of this state in the case of *State v. Roney*, 82 Ohio St. 376 [92 N. E. Rep. 486; 19 Ann. Cas. 918], say:

"A statute declared to take effect from and after a date named, takes effect on the day after the day of the date named."

And in the same case Justice Summers in the opinion says that the word "from" is a word of exclusion. Following the holding in this case the word "from" would exclude December 2, the day the notice was served. Counting from that date the ten days' notice required by the code would not have expired until December 13, and that day would have been the first day that the depositions could have been taken.

This rule will be further illustrated by reference to the case of *Best v. Doe*, 85 U. S. 112 [21 L. Ed. 805]; *Bemis v. Leonard*, 118 Mass. 502 [19 Am. Rep. 470]; *Holt v. Richardson*, 134 Ga. 287 [67 S. E. Rep. 798].

There was no error in the action of the court below in striking the depositions from the files.

The next error complained of was in the court sustaining the motion to set aside the service of notice and dismissing the appeal. Some little complaint is made on the part of the con-

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testee of the notice served upon him—that it recited that the notice of appeal was filed November 2. This was a mere clerical error and could not deceive the defendant. The election which was being contested was not held until after November 2. In addition to that the statute does not provide for notice of the date of filing. It says that the contestor shall file a notice of such appeal with the clerk, and give notice thereof in writing to the contestee. The mistake in date of filing notice of contest did not deprive the court of jurisdiction.

Some objection is made that the notice served on the contestee did not contain a copy of the notice of appeal filed with the clerk, but simply stated that a copy of such appeal is hereto attached. If it is necessary that the notice served on the contestee should contain a copy of the notice of appeal filed with the clerk, the attaching of it to the notice would be sufficient; it would then be part of the written notice served on defendant. But an examination of Sec. 5149 will show that it was not necessary that the copy of the notice of appeal filed with the clerk should be served upon the contestee. The section only provides that the contestee shall have notice in writing that a notice of contest has been filed with the clerk. This would not require that a copy of the notice of appeal accompany the notice to the contestee, or be served on the contestee.

We come now to the principal ground claimed for dismissing these proceedings. We have already stated that the notice of appeal was filed on December 2, and provided that depositions should be taken before two justices of the peace on December 12, and that the time fixed by this notice for taking the depositions was not sufficient under the requirements of the statute, and that it was proper to strike the depositions from the files. The question now to be determined is, is the requirement in the statute of the time depositions shall be taken jurisdictional, and if an error has been made in stating the time for taking the depositions does it deprive the court of common pleas of jurisdiction to hear and determine the contest?

Not much assistance in determining this question can be re-

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ceived from the adjudicated cases. It must largely be worked out from the statutory provisions providing for the contest of elections, but it may not be amiss to refer to the holding of our Supreme Court in construing statutes under somewhat similar conditions.

In the case of *Collins v. Millen*, 57 Ohio St. 289 [48 N. E. Rep. 1097], Bradbury, Justice, on page 291, in speaking of the right of appeal, says:

"The right, doubtless, is remedial in its nature; it is a proceeding in a civil action, given by our code of civil procedure, and falls within the letter and spirit of Sec. 4948 R. S., which commands a liberal construction of the provisions of our civil code.

"This court has heretofore recognized these liberal principles in a number of cases respecting steps necessary to perfect an appeal, and has been especially liberal in sanctioning amendments made to cure defects in the methods that parties have pursued in exercising this right of appeal."

The court at that time had before them an appeal in a civil action. We are considering not an appeal in a civil action, but in a special proceeding from a board, but we think the same liberal construction should be placed upon the statutes in this proceeding.

And further, on page 292 of the same case, the justice says:

"We recognize, however, that the courts can dispense with no condition prescribed by statute, as necessary to perfect an appeal, and that the only field open to the display of liberality in this connection is, in the construction of the statutes that prescribe these conditions."

And in this case we are not dispensing with a requirement prescribed by the statute, but we are determining whether a mistake in stating the time fixed by the statute for taking depositions will destroy the jurisdiction of the court over the proceedings.

Again, in the case of *Howard v. Shields*, 16 Ohio St. 184, Justice Welch, in the opinion on page 189, says:

"We think the notice was sufficient. It contains all that

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the statute requires—notice that the election will be contested, and a specification of the 'points' relied upon. There is no analogy between such a notice and a declaration at law."

In that case they were considering whether or not the grounds of the contest had been set out with sufficient particularity, and they construed that provision of the statute liberally.

Now, then, applying these rules to the present case we find that the notice of appeal filed with the clerk set out with special particularity all of the requirements of Sec. 5149, including when the depositions should be taken, but upon an examination of the time fixed for taking the depositions that the time allowed the defendant was not sufficient. The object of giving the contestee notice is that he may be apprised of the fact that there is a contest, and also of the grounds of that contest, in order that he may have a proper opportunity to meet the claims of the contestant.

The provision for taking the depositions is a mere procedure for getting the evidence before the court, and if there was no other provision for bringing the evidence before the court the mistake as to time might be fatal to contestant's proceedings, but the statute is now amended so that under the provision of Sec. 5152 a trial can proceed by taking oral testimony or depositions, as in civil actions. The striking from the files of these depositions would not deprive the contestant of an opportunity of introducing evidence in the case. He could produce his evidence under the provision of the latter section.

We think that it is placing too technical a construction upon a statute which should be liberally construed in order that the will of the people as expressed at the polls might be carried out, to hold that a mere mistake in the time provided for taking the depositions was jurisdictional, and deprived the court of common pleas of the right to hear and determine the case. We think that it was error in the court to sustain the motion to set aside the service and dismiss the appeal.

The defendant in error further urges that even if the court was in error in this, that the court erred in overruling the mo-

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tion to dismiss the proceedings on the ground that there had been a prior notice filed of a contest of this election by the same contestant, and therefore there was no prejudicial error in the dismissal of this case.

The record shows that on November 20, 1913, the contestant filed a notice of appeal with the clerk of the court of common pleas of this county contesting the same election of the contestee; that on November 28, a motion to make this notice of contest more definite and certain was filed and sustained, and that afterwards, on December 2, the contestant caused an entry to be made as follows:

"This day came the plaintiff, by his attorney, and dismissed this action at his costs without prejudice to a new action. No record to be made."

The contestee claims that this proceeding was an adjudication of the matter, and an affirmance of the acts of the board of deputy state supervisors of elections.

In the case of *Siegfried v. Railway*, 50 Ohio St. 294 [34 N. E. Rep. 331], the Supreme Court, in the opinion on page 296, distinguish between the dismissal of an action by the court and the voluntary dismissal of an action by the plaintiff himself without prejudice, and in the last sentence of the opinion the court say:

"A dismissal by the plaintiff involves no action of the court; it is a voluntary withdrawal of his case, and is not a failure in the action."

Again the Supreme Court in the case of *Wanzer v. Self*, 30 Ohio St. 378, say in the second proposition of the syllabus:

"A judgment dismissing an action without prejudice to a future action is an entirety, and, though it may have been so rendered erroneously, it will not constitute a bar to a subsequent action upon the same subject-matter."

In *Black*, Judgments Sec. 721, says:

"Where a bill in equity is dismissed 'without prejudice,' the effect of the reservation is to prevent the decree from constituting a bar to another suit brought upon the same subject-matter.

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"If the decree is absolutely void for want of authority to make such a reservation, there is no valid adjudication to stand in the way of a new suit. And if it is merely irregular or erroneous, it must be corrected on appeal, and until that is done, it must stand as rendered and can not be impeached collaterally."

The first appeal was dismissed by the voluntary action of the contestant without prejudice and is not a bar to a second appeal, by the same contestant, if perfected within the time fixed by the code.

We think there was no error in the court's action in overruling the motion to dismiss the action on this ground. The judgment of the court below is reversed and the cause remanded.

**Spence and Metcalfe, JJ., concur.**

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**CONTEMPT—HABEAS CORPUS.**

[Hamilton (1st) Court of Appeals, June 1, 1914.]

**Swing, Jones and Jones, JJ.**

(Swing, J., not sitting.)

**IN RE DAVIS FUSFELD. IN RE DAVID OSTEND.**

**IN RE, NATHAN CARL.**

**Habeas Corpus Does Not Lie for Release of One Committed for Contempt.**

Habeas corpus does not lie for the release of a prisoner who has been committed for contempt of court, where the court has jurisdiction and punishment by commitment is authorized.

**HABEAS CORPUS.**

*Louis Katz and Snyder & Dickerson, for petitioners.*

*Miller & Foster, contra.*



**Fustfeld, In re.****PER CURIAM.**

The three parties named in the caption above have severally applied to this court for a writ of habeas corpus asking that the same issue against Charles C. Cooper, sheriff of Hamilton county, commanding him to discharge them from custody. They are each under sentence by the superior court for violation of an order of that court enjoining them from interfering in various and specific ways with the business of the Fullworth Garment Company by which they had been employed.

A writ of habeas corpus can not be used to perform the office of a writ of error. This well known principle of law is clearly stated in *Shaw, Ex parte*, 7 Ohio St. 81 [70 Am. Dec. 55], as follows:

“A habeas corpus cannot be used as a summary process to review or revise errors or irregularities in the sentence of a court of competent jurisdiction. Imprisonment under a sentence cannot be unlawful, unless the sentence is an absolute nullity. If clearly unauthorized and void, relief from imprisonment may be obtained by habeas corpus; if voidable, a writ of error is the appropriate remedy.”

See also, *Swan In re*, 150 U. S. 637 [14 Sup. Ct. Rep. 225; 37 L. Ed. 1207]; *United States v. Pridgeon*, 153 U. S. 48 [14 Sup. Ct. Rep. 746; 38 L. Ed. 631].

The return of the sheriff shows the authority under which the prisoners are being held. It is contended by counsel for petitioners that the return is insufficient; for, while the jurisdiction of the court which imposed the sentence is conceded, it is argued that it exceeded its authority with respect to the extent of the punishment fixed. In support of this contention it is claimed that the court acted under authority of Sec. 12142 G. C., in imposing the sentence, when in fact the penalty for the breach of an order of injunction is fixed by Sec. 11888 G. C.

There is nothing in the return or in the record of proceedings in the superior court as shown by the affidavits and papers filed herein to indicate the particular section of the code upon which the court imposing the sentence relied. It is true that Sec. 11888 does provide especially for the punishment of a

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violation of an order of injunction, and it is also true that the preceding section states that such violation may be punished as a contempt of court. We do not think that the case relied upon by counsel for petitioners, *Grossner v. State*, not reported, goes to the extent of holding that a violation of an order of injunction, which the statute declares to be a contempt of court, can not be punished under the general provision of Sec. 12142. This latter section fixes the penalty for violation of offenses defined in Sec. 12137, which provides:

“A person guilty of any of the following acts may be punished as for a contempt: 1. Disobedience of or resistance to a lawful writ, process, order, rule, judgment or command of a court or an officer.”

There can be little or no doubt, it seems to us, that this language must be held to include a violation of an order of injunction such as the record shows was issued by the court below in the case out of which these proceedings arose. If this view is correct we are inclined to the opinion that the court had the right to proceed under either Sec. 11888 or Sec. 12142 G. C.

But outside of the question of which section should have controlled the action of the court, we hold that the relief prayed for must be denied, for the reason that proper relief would be afforded by proceedings in error; and that sufficient ground has not been shown to entitle the parties to discharge under a writ of habeas corpus.

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### EQUITY—MORTGAGES.

[Hamilton (1st) Court of Appeals, July, 1914.]

Swing, Jones and Jones, JJ.

(Judge O. B. Jones not sitting.)

\*CAROLINE BAUER V. LOUIS E. NICKOL ET AL.

**Indemnity Mortgage Regarded as Money not Equitably Due and Cannot be Recovered.**

The mortgage which the plaintiff seeks to foreclose in this case can be regarded only in the light of an indemnity, and under the equity rule that "if money is not equitably due, it ought not to be recovered," the petition is dismissed at plaintiff's costs.

APPEAL.

*Oscar W. Kuhn*, for plaintiff.

*Stephen W. Jones* and *Edward A. Tepe*, for defendants.

**JONES, E. H., J.:**

"This is an equitable action, and if the money is not equitably due it ought not to be recovered."

This is the first sentence in an opinion by Judge Welch in the case of *White v. Turpin*, 16 Ohio St. 270.

The above case was tried in this court on appeal from the court of common pleas, and is an action brought by the plaintiff for the foreclosure of a mortgage and marshaling of liens. The nature of the action can be briefly described by quoting from the defeasance clause of the mortgage which is the basis of the action:

"Provided Nevertheless, That whereas the said Caroline Bauer has advanced as a loan to Louis E. Nickol, the husband of the said Josephine B. Nickol, the sum of \$2,500 with which to enable him to build upon the premises of said Caroline Bauer, known as No. 2811 Woodburn avenue, Walnut Hills, Cincinnati, Ohio, certain new bakeovens for the use of Louis E. Nickol in carrying on a bakery in said premises, and to make

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\*Affirmed, no op., *Bauer v. Nichol*, 60 Bull. 447.

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certain other repairs, alterations and improvements in and upon said premises which the said Louis E. Nickol has agreed to take under a lease from the said Caroline Bauer for a period of ten years from the 1st day of June, 1909. And whereas the said Caroline Bauer in order to obtain the said \$2,500 has been compelled to mortgage her said premises to the East Walnut Hills Building & Loan Company by the terms of which mortgage she is to make certain weekly payments of dues, interest and premiums until said loan is repaid in full. And whereas the said Louis E. Nickol has agreed to repay said loan by assuming and agreeing to pay the loan of Caroline Bauer to the East Walnut Hills Building & Loan Company and an additional weekly payment of \$2.50 on the principal; now if the said Louis E. Nickol shall pay said loan in manner and form as agreed to be paid by the said Caroline Bauer, including the additional weekly payment of \$2.50 for the purpose of hastening the payment of said loan, then this mortgage shall be void; and in case of default in making any of said weekly payments to the said East Walnut Hills Building & Loan Company on said mortgage, the said Caroline Bauer shall have the immediate right to foreclose this mortgage and recover for the full amount that may be due upon the mortgage given by the said Caroline Bauer to the said East Walnut Hills Building & Loan Company at that time."

The defendant, Louis E. Nickol, occupied the premises leased to him by plaintiff herein, and conducted a bakery therein, for about fifteen months, when he failed in business and was declared a bankrupt. We find that up to the time of his said failure, he complied with his agreement and paid to the building association the dues, interest and premium and an additional \$2.50 per week upon the principal of said loan. In addition to the \$2,500 borrowed by Mrs. Bauer from the building association, Mr. Nickol spent in making the improvements upon her property \$800 of his own money. His rent was paid at the rate of \$60 per month, according to the terms of the lease. About half the cost of the improvements was paid by him during his brief tenancy. Shortly after he became a bankrupt and

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was forced to quit business. Mrs. Bauer, his lessor, assumed charge of her property and made a new lease to one Anthony Lass, for a term of five years, at \$90 per month.

The defendant, Josephine B. Nickol, is the wife of Louis E. Nickol, and executed the mortgage herein sought to be foreclosed, upon her individual property, as a guaranty to Mrs. Bauer that the terms of the lease would be complied with by her husband. The lease provided that the bakeovens and other improvements, when made, should be a part of the real estate, and become the property of the lessor, Mrs. Bauer. No issue is made as to her right and title to said improvements.

Judge Welch, in the opinion in the case of *White v. Turpin, supra*, asks the question: "In equity and justice then, ought this money to be paid a second time by the administrator?" The question before us is a similar one, viz: In equity and justice ought Mrs. Nickol be compelled to pay the balance due on the loan from the building association? A strict construction of her contract would possibly require an affirmative answer, but the day is past, if any day there ever was, when one must be awarded the "pound of flesh" for the sole reason that it is "so nominated in the bond." It has long been a familiar maxim in equity that "he who seeks equity, must do equity."

The demand of plaintiff in this action is harsh, unreasonable and unjust.

Mrs. Bauer will receive during 'the five years' term for which Mr. Lass has rented her property in additional rent which will accrue to her by reason of the improvements made on her property by Mr. Nickol, sufficient money to pay the balance due to the East Walnut Hills Building & Loan Company on her loan; then she will still have the property and the rental therefrom for many years to come. She has made no offer, whatever, to the defendant, Mrs. Nickol, either of the premises or of the additional rents derived or to be derived from the improvements made thereon. So far as the proceedings in this court show, there has been no offer or tender of any nature made by the plaintiff, and no disposition manifested by her to

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work out a just solution of the situation which Mr. Nickol's unforeseen business reverses and bankruptcy brought about.

We hold that, in view of the unexpected developments of the case and the short duration of Mr. Nickol's tenancy it can not be successfully contended that Mrs. Nickol could be held under her mortgage, except as an indemnitor against loss on the part of Mrs. Bauer. "In ascertaining the intention of the parties the court must take into consideration not only the language of the contract, but the situation of the parties and the circumstances surrounding them at the time the contract was made" (22 Cyc. 85). Applying this rule, we are of the opinion that the most a court of equity could say for the mortgage held by Mrs. Bauer is that it can only be regarded in the light of an indemnity, the office of which is to protect Mrs. Bauer from any actual loss by reason of the transaction. In the trial of the case no effort was made to show that any loss was sustained by Mrs. Bauer. She suffered no loss by the transaction. On the contrary, we think the evidence shows that she gained thereby. The money sought to be recovered by her is, therefore, not equitably due, and as said by Judge Welch, "If the money is not equitably due, it ought not to be recovered."

The petition of plaintiff will be dismissed at her costs, and defendants may go hence without day.

Swing, J., concurs.

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### STREET RAILWAYS.

[Richland (5th) Court of Appeals, February Term, 1914.]

Voorhees, Shields and Powell, JJ.

MANSFIELD RY. L. & P. CO. v. JOHN E. BARR.

1. Electric Railway Required to Protect Lineman Repairing Wire from Injuries by Passing Cars.

Where a repairman is sent to adjust a trolley wire, it is the duty of the railway company in the exercise of ordinary care to make proper provision to protect him from injury from cars using the track over which the wire upon which he is at work is strung.

2. Motorman not Fellow Servant of Lineman.

A motorman running a car upon such track under the direction of his conductor is not a fellow servant of one engaged in repairing the trolley wires.

3. Negligence of Lineman Repairing Trolley Wires Jumping from Perch on Approach of Car in Dangerous Proximity Question for Jury.

Where a repairman so engaged discovered a car bearing down upon him and in dangerous proximity, it is for the jury to say, under proper instructions from the court, whether or not he was guilty of contributory negligence in jumping from his perch, thereby sustaining the injuries of which he complains.

4. Verdict for Personal Injuries not Set Aside unless Excess so Great as to Shock Sound Judgment.

A verdict for personal injuries will not be set aside simply because it is excessive in the mind of the court, but only where the excess is so great as to shock sound judgment and a sense of fairness toward the defendant.

[Syllabus by the court.]

ERROR.

*McBride & Wolfe*, for plaintiff in error.

*W. S. Kerr*, for defendant in error.

### PER CURIAM.

A verdict of \$8,500 was awarded the defendant in error, as damages for personal injuries alleged to have been sustained by him as a result of the alleged negligence of the plaintiff in error, while he was in its employ as a repairman of its electric lines.

To state the cause of action more fully, the plaintiff in his petition filed in the court below alleged:

"That on October 9, 1909, and prior thereto he was em-

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ployed by the defendant as a repairman on its lines in Mansfield, Ohio, and to do such other work and service in connection with the maintenance and repair of its lines as might be assigned him by the defendant. In doing said work for the defendant he was required, when it became necessary, to go up on top of a repair car and from that position repair wires, switches, etc. On said October 9, 1909, there was a break in the wires of said defendant's lines on Spring Mill street of said city at or near the point where Mulberry street and Spring Mill street branch. In the usual and ordinary course of his duty he went to the break on a repair car, and went on top of said car, which was about twelve feet above the street, to repair said break and while so engaged and without any fault or negligence on his part the repair car, upon which he was standing in doing the work aforesaid, was run into by one of the defendant's cars from the Shelby line.

"That when he saw that the Shelby car was going to strike his car, he was standing on the top of a platform or box of sufficient elevation above the roof of the car to enable him to reach and do the work he was doing and being afraid that he would be thrown from the box or platform to the street by the collision of the cars he jumped from the platform or box to the roof of the car and by the shock of the collision he was thrown from the roof of the car to the brick street.

"That he struck on his feet on the brick street from a distance of about twelve feet and that both ankles were fractured that the bones of his ankles have grown together where some of the fractures were, and that he is now unable to walk but with great difficulty and he is permanently disabled from doing manual labor. He suffered great pain and he is unable to walk without great pain and suffering in his ankles. He expended the sum of \$100 for medical services in attempting to be cured.

"That the defendant by its servants negligently and recklessly ran the said Shelby car onto and against the repair car on which he was working and thereby caused the injuries of which he complains; that the said Shelby car was under the



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charge of a conductor who had control of the movements of the same, and that a motorman was employed on said Shelby car who was under the control of the conductor and that said conductor and motorman negligently and recklessly ran said Shelby car onto and against said repair car as alleged; and he avers that the officer or agent of the defendant who has the supervision and control of the movement of the cars on the defendant's lines, with knowledge that plaintiff was engaged in repairing the lines as alleged and that in doing so it was necessary that said repair car occupy the track, failed and neglected to notify or warn the conductor on Shelby car of this fact, whereby the injury to plaintiff would have been prevented. He says the car on which he was working was in sight of the conductor and motorman of the Shelby car and that he could be seen far enough to stop the Shelby car if they had exercised reasonable care in the premises. The defendant is a corporation organized under the laws of Ohio, and as such operated a city and suburban railway in the city of Mansfield and to Shelby as alleged. Wherefore judgment is prayed for in the sum of \$10,000."

By answer the defendant admits that the plaintiff on October 9, 1909, and prior thereto was employed by it as stated in said petition, that in doing said work for the defendant he was required and it became necessary to go up on the top of a repair car and from that position repair wires, switches, etc.; that on said October 9, there was a break in the wires of the defendant's wires on Spring Mill street; that he went to the break on a repair car, and went on top of said car to repair said break, but it denies all the other allegations in said petition.

For a second defense the defendant says "that the plaintiff's injuries, if any were received, were caused by his own fault and negligence directly contributing thereto in jumping from said car and in taking no precaution whatever for his own safety."

The reply is a general denial of the contributory negligence charged.

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Upon the issues thus made by the pleadings, the cause was submitted to a jury resulting in a verdict for the plaintiff. A motion for a new trial was overruled and judgment was entered upon said verdict. A bill of exceptions was taken containing all the evidence offered upon the trial, including the charge of the trial court, and by a petition in error said cause was brought into this court for review.

There is little or no controversy between the parties hereto as to the facts leading up to the injury here complained of. The employment of the defendant in error by the plaintiff in error to repair the wires on its lines, and, if necessary, to make such repairs on the top of its repair cars, that in pursuance of such employment he went on top of such car to repair a break in the wires of the plaintiff in error at the time and place stated, and while he was so at work an interurban car on the Shelby line of the plaintiff in error, operated by a motorman in its employ, collided with said repair car, is admitted; and while it is not contended that the defendant in error was not injured thereby, it is insisted by the plaintiff in error that whatever injuries were sustained by the defendant in error were caused by his own negligence and carelessness, and that therefore said company is not liable in this action.

It is hardly necessary to remark that if the evidence fairly shows the facts to be as claimed by the plaintiff in error, namely, that the defendant in error's negligence directly contributed to or was the proximate cause of his injury, or if it should appear by the evidence that the concurrent negligence of both the defendant in error and the plaintiff in error contributed to and produced said injury, then the motion submitted for an instructed verdict should have been sustained and not overruled.

An examination into the facts of this case as disclosed by the bill of exceptions tends to show that on the morning of the day mentioned the defendant in error, then in the employ of said company as lineman, seeing the break in the wires of said company at the place mentioned, and upon arriving at said company's office reported the same to the general manager of said

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company, who personally directed him to repair said break without delay. Acting under such directions he prepared to make such repairs, and soon thereafter took out and employed the use of the repair car of said company used for such purposes, following what was known as the Shelby car of said company, operated on and over the streets in the city of Mansfield, and between Shelby and said city of Mansfield, to the place where the wires of said company were out of repair, and where said repair car stopped on said company's tracks, with its brakes set, to enable the defendant in error, with a helper, to make such repairs. It appears that said repair car was so constructed that it became necessary to use a box on top of the platform of said car to make said repairs, and that such a box was used by the defendant in error for that purpose, and that while on said box at work repairing said wires, with his back to the north, his attention was called by his helper to a Shelby interurban car approaching, when turning around and finding that said car was about to collide with said repair car, he jumped to get down and failing to get hold of anything he fell on the brick pavement and was injured, or quoting from the language of the witness "I turned right around, saw that it was right on to us, and I made a jump to get down and get hold of something and I went on off;" that said interurban car did there collide with said repair car, knocking the latter forward on the tracks of the company some considerable distance from the point of said collision.

It further appears that said report of the condition of said wires was so made to the manager of said company about 8:30 on the morning mentioned; that the Shelby car which the defendant in error followed with said repair car to Spring Mill street, where the wires were out of repair, left Mansfield for Shelby at nine o'clock on said morning; that under the schedule time of said company a car from Shelby bound for Mansfield left Shelby at 9:05 on said morning; that such car would pass the car going from Mansfield to Shelby, if on schedule time, at Spring Mill, where it was the rule or custom to have telephonic communication between the officers or employees of

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such car and the Mansfield office of said company, and that a like rule or custom obtained with cars leaving Shelby for Mansfield. The foregoing facts as gleaned from the bill of exceptions have been stated with some degree of particularity that they may aid in the consideration of the issues raised by the pleadings therein.

It is fundamental that negligence as a ground of recovery is not to be presumed from the happening of an accident but must be proven. As was announced in the case of *Cleveland, T. & V. Ry. v. Marsh*, 63 Ohio St. 236 [58 N. E. Rep. 821; 52 L. R. A. 142]:

“Negligence must be proved either by testimony directly establishing the fact, or by the proof of facts from which such negligence will reasonably follow and be presumed. The jury can not be allowed to guess that there was negligence without some proof thereof, either direct or inferential.”

The correctness of this proposition as one of law is not to be questioned. In the abstract it is applicable alike to all cases triable by jury, namely, that the material and ultimate fact upon which a recovery is sought must be proven. The importance of applying this salutary and essential principle of law is emphasized by the verdict in this case. The amount of the verdict, when considered with reference to the issues raised by the pleadings, renders it necessary that the whole record of the case should be thoroughly canvassed with the sole view of ascertaining whether such verdict is authorized by the evidence and the law. To this end we have read the entire bill of exceptions with not a little care with reference to the respective claims of counsel on either side.

It is charged in the petition that the company was negligent in running its Shelby interurban car against and colliding with the repair car on which the defendant in error was at work repairing said wires, which it is alleged was the proximate cause of his injury. The testimony as to whether the manager of the company who is in legal effect the master here, personally directed the defendant in error to repair said wires is somewhat in conflict, but we are inclined to hold that a fair construction

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of the testimony in this respect shows that such order was given. Having been ordered to go to the scene of the work to repair these wires with said repair car, and having gone and engaged upon said car as ordered, which was known to be peculiarly dangerous, with the knowledge on the part of the company that cars were scheduled soon thereafter to pass at the place where he was so engaged, including the said Shelby interurban car, was it not the duty of the plaintiff in error, in the exercise of ordinary care, to make proper provision for the safety of the defendant in error as would afford him protection from the dangers incident to the operation and movement of cars between Shelby and Mansfield and in Mansfield, to avoid collision with said repair car while he was engaged in said work of repairs? We think, it was, and we further think that this question, in terms, was properly submitted to the jury by the trial court in its charge. *Lake Shore & M. S. Ry. v. Murphy*, 50 Ohio St. 135 [33 N. E. Rep. 403]; *Lake Shore & M. S. Ry. v. Lavalley*, 36 Ohio St. 221; *New York C. & St. L. Ry. v. Roe*, 25 O. C. C. 628 (4 N. S. 284).

It was contended on behalf of the plaintiff in error that the motorman in charge of the Shelby interurban car and the defendant in error were fellow servants, and that therefore, if the injury to the defendant in error was the result of negligence, it was that of a fellow servant and not that of the plaintiff in error. Plaintiff in error testified that he was acquainted with the rules of the company in the operation of its cars between Shelby and Mansfield, and that before leaving Shelby the officers or employees of the car would "call in and get orders" from the Mansfield office, and the same practice was observed in passing Spring Mill. If this is true, knowledge of the time the car in question left Shelby was brought direct to the knowledge of the plaintiff in error, and although the motorman of such car may have been negligent in failing to see said repair car and in colliding with it, if the plaintiff in error then knew that said interurban car was on its way from Shelby to Mansfield, and then knew that the defendant in error was then engaged in the work of repairing said wires and took no steps to

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protect him from the danger of said car colliding with said repair car, and colliding with said repair car the defendant was thereby injured, then it would be a question for the jury to determine whether or not the plaintiff in error was not guilty of negligence, and if so, whether or not such negligence was the direct and proximate cause of the injury to the defendant in error. On this subject the court below charged the jury as follows:

"If you find that the manager of the company knew that the plaintiff in the discharge of his duties intended to make the alleged repairs on said trolley, and you further find that an ordinarily prudent person, under the circumstances and in the situation of the manager of the defendant company, would have reasonably apprehended from the character of the work and the time and place of its performance that the plaintiff would, in the performance of such work, under the circumstances, be placed in peril and danger by reason of the operation of the city and interurban cars upon the track at such point where plaintiff was working, then it would be the duty of the defendant to exercise ordinary care to obviate possible injury to plaintiff arising from the perils, if any, that might reasonably be apprehended in the operation of its cars at said place, while plaintiff was in the performance of his duties.

"If the defendant failed or omitted to exercise such care, then such failure or omission would constitute negligence on its part, and, if such negligence was the direct and proximate cause of injury to the plaintiff, or if the motorman of the car that collided with the work car was guilty of negligence as charged in the petition, and such negligence, if any, combined with the negligence of the defendant resulted in injury to the plaintiff, defendant would be liable, unless plaintiff, immediately prior to and at the time of the accident was guilty of negligence directly contributing to his own injury."

We think that the foregoing contains a fair and correct statement of the law applicable to the facts in this case.

While the defendant in error on entering the service of the company assumed the ordinary and natural risks incident to

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his employment, including those of his fellow servants, he did not assume the negligence of the company. The motorman here was engaged in another branch and department of service and in a different service from that of the defendant in error. He was engaged in managing and operating an electric car under the control of a conductor, while the defendant in error was a general repairman with no one in authority over him. Their duties were entirely separate and distinct, and being engaged in different branches and departments of service, we are of the opinion that they were not fellow servants, so that while the motorman in charge of the Shelby interurban car may have been negligent, still under the facts as they appear here, the commingled negligence of the motorman with that of the company would be the negligence of the company and render it liable. *Carter v. McDermott*, 5 St. Railway Report 72; *Pittsburg, C. & St. L. Ry. v. Henderson*, 37 Ohio St. 549; *New York C. & St. L. Ry. v. Roe*, *supra*.

It is contended by the plaintiff in error that the conduct of the defendant in error in jumping from the repair car immediately before the collision showed such contributory negligence upon his part as to defeat his right to a recovery herein. This was a question for the jury, and upon this subject we are of the opinion that the court below properly instructed the jury, in the light of the uncontradicted testimony of the defendant in error that he suddenly found himself in a position of imminent danger by the close approach of the Shelby interurban car to the repair car on which he was working, he was not to be held to a strict account as to the course of conduct pursued by him to avoid danger, and possibly save his life. *Pennsylvania Ry. v. Snyder*, 55 Ohio St. 342 [45 N. E. Rep. 559; 60 Am. St. Rep. 700].

It is also contended by the plaintiff in error that the court below erred in its charge to the jury in not definitely defining the issues between the parties hereto. A reading of said charge shows that the pleadings were not only read to the jury but that the issues of fact as raised therein were later on during said court's charge to the jury called to the attention of the

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jury and special instructions pertaining thereto were given by said court, all of which we are of the opinion was entirely consistent with the rule laid down in the case of *Baltimore & Ohio Ry. v. Lockwood*, 72 Ohio St. 586 [74 N. E. Rep. 1071].

It is further contended by the plaintiff in error that the court below erred in its instructions to the jury respecting the duty of the company in the matter of furnishing the defendant in error a safe place to work. On this subject said court charged the jury as follows:

"The relation between plaintiff and defendant was that of master and servant and by virtue of such relation while the plaintiff was in its employ, the defendant would owe to him the duty of exercising ordinary care to provide him a reasonably safe place for the performance of his services. Thus a master would be bound to take all such precautions for the protection of one in his employ as an ordinarily prudent person would take to protect a servant in his employ from danger, having due regard for the character of the work and the place of its performance."

This instruction we think is in harmony with the principle enunciated in the case of *Cincinnati, H. & D. Ry. v. Frye*, 80 Ohio St. 289 [88 N. E. Rep. 642; 131 Am. St. Rep. 709], and we therefore hold that the contention of the plaintiff in error in this respect is not sustained.

Errors are also claimed in the action of the court below in the admission and exclusion of certain evidence offered upon the trial including the examination of the ankles of the defendant in error by a physician in the presence of the jury, and the advice given by a certain physician to the defendant in error to have his case treated by a certain Chicago specialist and his charges therefor, and alleged conversations with the defendant in error in respect to the cause of the accident, all of which we have looked into and we are of the opinion that while perhaps technical errors did intervene in the admission of testimony offered in the respects mentioned, we do not regard them as prejudicially affecting the interests of the plaintiff in error, and for this reason we hold that they, or either of them, do not constitute ground for reversible error.



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The petition in error filed herein sets forth as one of the grounds of error assigned that the court below refused "to give the several charges asked for by the defendant in error." We have examined said petition in error with reference to this alleged assignment of error and find no such requests made.

It is urged that the verdict and judgment are against the weight of the evidence and contrary to law, and that the damages are so excessive as to appear to have been given under passion or prejudice. As before stated, we have read the entire bill of exceptions and have carefully considered such parts of it as relate to the more important features of this case, and in the light of the direction given to the defendant in error to do this repair work, the circumstances under which it was done, or undertaken to be done, the history of the facts known to or presumed to have been known by the company immediately preceding and at the time of the collision of the cars resulting in injury to the defendant in error, with the case fairly presented to the jury, under proper instructions, as a reviewing court we do not feel justified in disturbing the verdict of the jury upon the ground that the same is not sustained by the evidence, or that the same was clearly against the weight of the evidence and contrary to law.

As to the damages being excessive as if given under the influence of passion and prejudice, in the absence of a showing made that the jury were so influenced, the presumption would be otherwise. True the verdict given was for a substantial sum, but it was the province of the jury to fix upon the compensation to be awarded the defendant in error, if any, under the facts in the case as shown by the evidence.

In *Fisher v. Patterson*, 14 Ohio 418, 427, which was a suit for libel, Judge Read announcing the opinion of the court said:

"In cases where the damages are to be determined by the sound discretion of the jury, in view of all the evidence the court will not interfere to grant a new trial on the ground of excess, unless the damages are so outrageously gross as to convince the court that the jury must have acted from corruption, or bias, or mistake, or some other improper influence, instead of a sound and enlightened judgment."

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In *Lake Shore & M. S. Ry. v. Schultz*, 9 Circ. Dec. 816 (9 R. 639); which was a personal injury case, Judge Parker announcing the opinion of the court, quoting with approval Judge Hammond in *Smith v. Railway*, 12 O. F. D. 188 (90 Fed. Rep. 783), said:

"A verdict should not be set aside simply because it is excessive in the mind of the court, but only, when the excess is shocking to a sound judgment and a sense of fairness to the defendant. When there is any margin for a reasonable difference of opinion in the matter, the view of the court should yield to the verdict of the jury rather than the contrary."

In *Walker v. Railway*, 63 Barb. 267 (N. Y.) which was a personal injury case, the trial judge said:

"The defendant's counsel, however, contends that the recovery in the action was excessive. In this class of cases no precise rule exists, by which the extent of the recovery can be prescribed; for the compensation to be received is, to a great extent, to be awarded for pain and suffering which can not be accurately measured by amounts. \* \* \* The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them, may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the courts is and necessarily must be, not to interfere with their conclusion."

In the case before us the evidence showed the defendant in error to be 37 years of age, in good health and receiving fair wages when injured. Upon the whole case we can not say that the compensation awarded by the jury is unreasonable or excessive and we therefore do not feel justified in disturbing said verdict. We are therefore of the opinion that the court of common pleas did not err in overruling the motion for a new trial, and the judgment of said court will therefore be affirmed with costs, but without penalty. Exception may be noted.

Swanson v. Commissioners.

### BRIDGES—COUNTIES—PLEADINGS.

[Tuscarawas (5th) Court of Appeals, June 11, 1915.]

Shields, Powell and Houck, JJ.

S. A. SWANSON ET AL. V. TUSCARAWAS CO. (COMR.) ET AL.

1. Approval in Writing by Prosecutor of Form and Correctness of Contract for Building County Bridge Sufficient Compliance with Emergency Statute.

In an action involving the contract for the building of a county bridge under the emergency statute, an allegation that the prosecuting attorney approved in writing the form and correctness of the contract as entered into by the county commissioners, is a sufficient compliance with the requirement of Sec. 2356 G. C., having reference to contracts exceeding \$1,000.

2. Statutory Provisions for Notice of Improvement not Applicable in Case of Casualty Requiring Prompt Action.

The provisions for notice of an intended purchase or improvement, found in Sec. 2444 G. C., do not apply to the construction of a new bridge in case of a casualty requiring prompt action.

3. Motion, not. Demurrer, Lies to Petition Involving Replacing of County Bridge, Indefinite as Location of Site of Bridge.

A petition drawn under favor of Sec. 5638 G. C., involving the replacing of a county bridge at a cost exceeding \$18,000 without a vote of the electors, is not open to demurrer for indefiniteness of statement as to whether the new bridge is to occupy the site of the old one. An objection of that character can only be reached by motion.

[Syllabus by the court.]

ERROR.

*Lynch & Day, D. A. Hollingsworth and J. F. Greene*, for plaintiffs in error.

*W. V. Wright and E. E. Lindsay*, for defendants in error.

HOUCK, J.

The court below sustained a general demurrer to the petition of plaintiffs in error, the plaintiffs below, and judgment was rendered against plaintiffs in error for the costs, and error is now prosecuted to this court to reverse the judgment of the common pleas court in sustaining said demurrer.

The right is claimed, by plaintiffs to maintain their action

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and their petition is drawn under favor of Sec. 5638 G. C., *et seq.*, which provides for the construction of a bridge in a case of casualty, at a cost exceeding \$18,000, without a vote of the electors, when "an important bridge belonging to or maintained by any county becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of said county and the repairs thereof, or the building of a new bridge in place thereof, is deemed by them necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county." \* \* \*

Counsel for defendants, rely upon three grounds in support of the demurrer, to-wit:

1. That the contract, between plaintiffs and defendants was not approved by the prosecuting attorney, as required by law.

2. Failure to publish notice of intention to erect bridge.

3. That the averment in the petition "that the contract provided for the construction of a new bridge to be built at or not far distant from the point where the old bridge stood" is not sufficient, and does not comply with the sections of the General Code hereinbefore referred to.

We have given each and all of the grounds of the demurrer careful consideration, and as to the first, we are of the opinion that the allegation in the petition "that the prosecuting attorney of the county also in writing approved the form and correctness of the contract" is a compliance with the requirements of Sec. 2356 G. C., which provides:

"Before work is done or material furnished, all contracts that exceed one thousand dollars in amount shall be submitted by the commissioners to the prosecuting attorney of the county. If found by him to be in accordance with the provisions of this chapter, and his certificate to that effect is indorsed thereon, such contracts shall have full force and effect, otherwise they shall be null and void."

The second ground of the demurrer attacks the validity of the petition, for the reason, that Sec. 2444 G. C. was not complied with. This section of the code provides:

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"Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate handbills, and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building, or location is made. They shall hear all petitions for, and remonstrances against, such proposed purchase, location, or improvement."

Statutes are construed according to their intent and meaning. The petition, in this case, was drawn under favor of Sec. 5638 G. C., *et seq.*, which provides for the construction of new bridges in case of casualty. It is a special statute and to be used on special occasions and was enacted by the legislature to cover particular cases as they might occur and which needed prompt action on the part of the county commissioners, and for which other statutes did not provide.

Giving to Sec. 5638, *et seq.*, that fair and liberal interpretation that the legislature certainly intended they should have and for the purposes for which they were enacted, we are unable to see where Sec. 2444 G. C. has any application to the case at bar, and therefore are of the opinion that this branch of the demurrer is not well taken.

Coming now to the third branch of the demurrer, which is the real problem to be solved, will say that it is a question of importance and has caused us much study of the numerous authorities cited by counsel, as well as an exhaustive research on the part of the court of other authorities.

Counsel for the demurrer, in their brief, contend that the commissioners have no right to contract for a bridge to be constructed at a point "not far from the old bridge," but they do not say anything concerning the word "at" which precedes the above language and is followed by the word "or." The language in the petition is "at or not far from the point where the old bridge stood."

Would it not be just as reasonable to say that the bridge was to be built at the place where the old bridge stood? How

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can a court relying wholly and entirely upon the language used infer that the bridge is or will be constructed not far from the point where the old bridge stood? Has not the court the same right to rely upon the word at and say that the bridge will be built at the point where the old bridge stood?

The court in passing upon the demurrer has no right to go outside of the petition for information, but must rely wholly and entirely upon the language used in the petition.

The demurrer challenges the language of the petition as not being sufficient in law, but must and does admit all the allegations to be true.

Can it be properly claimed from the language used that the contract does not provide that the new bridge can be built at a point where the old bridge stood? We think not. And if this be true then the petition is good as against a general demurrer.

If the defendants did not know, or could not ascertain from the language used in the petition, whether the new bridge was to be built at a point where the old bridge stood, or not far from the point where the old bridge stood then it was their privilege to file a motion, asking that the petition be made definite and certain in this particular.

The most that can be claimed for the language used, is that it is indefinite; if so, then the objection should have been raised by motion and not demurrer.

The sufficiency of pleadings under the code as to certainty, precision, definiteness and consistency of allegation, and indeed in respect of every other variety of defect of allegations which does not amount to such an absolute omission of fact as to constitute no ground of action or defense must be taken advantage of or objected to by motion under the provision of the code, and can afford no ground for demurrer.

The demurrer admits all that is expressly alleged and properly set forth in the petition, and also whatever can, by a fair and reasonable intentment be implied from the allegations of fact contained therein.

Taking this view of it, and upon the whole case, a majority

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of the court is of the opinion that the common pleas court erred in sustaining the demurrer, and the judgment below is reversed, and the cause remanded to the court of common pleas with direction to overrule the demurrer to the petition, and for further proceedings according to law.

**Powell, J., concurs.**

**Shields, J., dissents.**

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**INJUNCTION—RAILROADS.**

[Stark (5th) Court of Appeals, April 22, 1915.]

**Shields, Powell and Houck, JJ.**

**JOHN SOMMER v. PENNSYLVANIA CO.**

**Injunction Against Placing Railway Track in Street until Abutting Owner Compensated.**

It is the duty of a court to protect the rights of an abutting owner in the street, and where it is proposed to place a railway track across the street with crossing gates, and the obstruction will be near enough to the property of an abutting owner to materially affect it or depreciate its value, injunction will lie until the property owner has been properly compensated.

[Syllabus by the court.]

**APPEAL.**

*Pontius & McDowell*, for plaintiff.

*Cary & Armstrong*, for defendant.

**HOUCK, J.**

The plaintiff commenced suit against the defendant to enjoin it from constructing its railroad track along the corner of, and within a distance of about nine feet of the lot owned by plaintiff, on which is located a business property; also to enjoin it from construing crossing gates across the street, directly in front of the business property of said plaintiff.

The plaintiff in his petition, in part, says:

“That he is the owner of the following described real estate in the city of Canton, county of Stark and state of Ohio, being described as follows: Parts of lots known as lots No.

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796 and 495 in said city of Canton, Ohio, and beginning at the north-east corner of said lot No. 796; thence westwardly along the north line of lot No. 796 and No. 495 a distance of 85 feet; thence southwardly and parallel with the east line of lot. No. 796 a distance of 72 feet; thence eastwardly parallel with the north line of said lot No. 796 a distance of 85 feet; thence northwardly along the eastwardly line of said lot No. 796, 72 feet to the place of beginning.

"That said lot has a frontage of 72 feet on what is known as Market Avenue South in said city of Canton, Ohio, on the west side of said avenue. That said street has been duly dedicated to the use of the public as a street, the fee thereof being vested in said city in trust for said public use; that said street along said premises is 60 feet wide; and has been open for travel and public use for more than fifty years; that his said premises and the building thereon are of great value, and which improvements thereon were made with reference to the present location of the tracks of the defendant.

"The said defendant is operating its railroad through said city and that four of its tracks cross said Market Avenue South, and that said tracks are laid side by side and have been in their present location for many years past. That said defendant company is now building a depot or station on the east side of Market Avenue South and northwardly from its present tracks about 125 feet, and that it is about to and will unless restrained by this court, build one or more tracks for its use, as a main line across said Market Avenue South, and northwardly from where its said tracks are now located, and if permitted to do so that the north line of said tracks will intersect the east line of said Market Avenue South directly opposite on said Market Avenue South, and so that the said tracks will intersect the west line of Market Avenue South at a point about five feet southwardly from the southeastwardly corner of said premises of the plaintiff; and it proposes to build said tracks across said street at grade, and will place crossing gates in said Market Avenue South, northwardly of said tracks, and plaintiff says that such construction of said tracks and crossing



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gates will be an obstruction of the said street along and in front of his entire premises; and that the defendant has no right or authority at law to do same, and has no right to use said street by crossing it with tracks in any other manner or place than it now uses the same; that said proposed construction will constitute a change or alteration of the location of its railroad across said street at grade; that said contemplated change will render the plaintiff's property worthless and will deprive him of his property right in said street and the private rights and easements which he now has by reason of being the owner of the premises herein before described; and that the contemplated use of said street will be a diversion of it to other purposes from which it was dedicated. Plaintiff says that he will be irreparably damaged, for which he has no adequate remedy at law, and prays for an injunction against the defendant and other equitable relief."

The defendant, by its answer, denies all of the material allegations in the petition of the plaintiff and further says that at the time the plaintiff purchased the real estate described in his petition, and made the improvements thereon, that he had full knowledge of the nature and extent of all of the contemplated improvements that were about to be made by the defendants; that said improvements, gates and changes of tracks contemplated by defendant will in no way interfere with or damage the plaintiff; and that he will not suffer irreparable damage, and that he has an adequate remedy at law, and prays that plaintiff's petition be dismissed.

The plaintiff filed a reply to the answer of the defendant, which is, in substance, a general denial of all of the material allegations in the answer of the defendant.

Upon the issue joined, the cause was tried in the common pleas court, and a decree was entered in favor of plaintiff, granting him all of the relief prayed for in his petition, and making the temporary restraining order and injunction heretofore allowed perpetual.

The cause was appealed to this court. The defendant filed

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a motion, in this court, to suspend or dissolve said injunction for the following reasons, to-wit:

"First, for the reason set forth in the answer herein filed in this case.

"Second, the ultimate relief, if plaintiff is entitled to any, is compensation and damages, and plaintiff's rights in the premises can be fully secured and enforced without the delay and inconvenience incident to injunction."

The motion was submitted in this court, on the testimony as appears in the record below.

The material facts are not in dispute, and the court is called upon to determine the question of law, which is conceded by counsel upon both sides to be but one, and that is, has the plaintiff pursued the proper remedy?

The plaintiff contends that his remedy is injunction, and the defendant maintains that the plaintiff has an adequate remedy at law, and if he has been damaged he should resort to a court of law and seek a recovery in damages, and not to a court of equity for injunction.

The question herein submitted is one of importance and vital interest to the parties to this suit.

Upon the one hand we have a private individual who is the owner of a business property, who maintains if the defendant is permitted to lay said tracks and erect said gates in and on said street as set forth in plaintiff's petition, it will result in great damage to him and his property.

Upon the other hand, we have a railway company with large money and property investments seeking to extend its interests by the laying of tracks, which must be conceded will not only be of value to the defendant company, but of great value to the general public.

The defendant company by its counsel, argues with much force and contends that under Sec. 8765 G. C., of Ohio, that the plaintiff's remedy is one at law.

Counsel insist if a strong judicial interpretation is given this section in question, that the remedy that plaintiff should pursue is an action for damages and not for injunction.

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The section referred to provides:

"Every company which lays a track upon or over any such street, alley, road or ground, or part thereof shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of the track."

We have examined this statute with some care with a view of ascertaining its true intent and meaning, as applied to the case at bar, and in our opinion we can not find anything that would or could be interpreted to mean or to convey the interpretation claimed by it for counsel for the defendant.

This statute limits the time in which a suit may be brought for damages by persons who are injured by the laying of tracks but it does not in any way provide or determine the remedy that may be pursued if damages are not sought for injury resulting, or that may result from the laying of railroad tracks upon or near the ground or property of the owner thereof.

We do not understand how it could be properly claimed that under this statute that a person owning property abutting on a street, and who claimed to be injured by the laying of railroad tracks and placing crossing gates on said street and in front of the business property thereon, could not invoke the remedy offered by injunction.

It is contended by counsel for defendant, that an abutting property owner on a street has not such property right and interest in and to the street as would entitle him to relief by injunction, in a suit like the one at bar; but we do not think this claim is well founded.

At this time we do not deem it necessary to discuss at great length, the character, nature, right and extent of the owner in and to lands abutting on a street, and his interest by reason of such ownership in and to the street upon which said lands abut.

It is certainly a right which attaches to the abutting owner's land, and he certainly has a property right therein, and it matters not whether the fee to the street be in the municipality

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in trust for public uses, or whether the fee be in the abutting property owner he nevertheless has a property right, and if he has a property right in and to said street, then under the constitution of our state, such property right can not be taken, by the defendant, unless the plaintiff is first compensated for same.

As we view it, it is the duty of a court of equity, in cases like the one at bar, to protect the property and rights of the owner in and to the street on which said property abuts, and to see to it that the private property owned by such person is not taken unless he is first compensated for same.

If the placing of a railroad track across the street in question, and the placing of crossing gates on said street and in front of the property of plaintiff, is near enough to the property to materially affect it, or depreciate its value, then, in our opinion, the plaintiff has a right to be compensated before the street is so obstructed, and he may properly invoke the remedy offered by injunction.

It has been established by a long line of authorities not only in this but in other states, that if the owner's right in and to the street be property (referring to abutting property owner), that the same can not be taken from such property owner, except in time of war or other public exigency, unless compensation therefor shall be first made in money or first secured by a deposit of money; and if it were not so, then a person's property would not be safe at any time, and it inevitably follows that the attempt to take the property of the plaintiff in question is an invasion of the constitutional rights of the plaintiff, that private property shall not be taken without compensation be first made therefor.

It is an invasion of the rights of plaintiff to place in a street in front of his lot and business property a railroad track and crossing gates, which will impair the owner's access to his property, and otherwise interfere with him in his full enjoyment of his property for all purposes to which it is adapted, and of the street itself, and such is an invasion and an attempted taking; it is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all

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against the will of the owner, it must be upon the terms prescribed by the constitution.

We feel that the law in this case is well established and that the theory of this court of the law as indicated herein is fully determined and well established in a long line of cases, and especially by our Supreme Court in this state, and we need but cite the case of *Scioto Val. Ry. v. Lawrence*, 38 Ohio St. 41 (43 Am. Rep. 419), the syllabus being as follows:

"1. Where the construction of a railroad in a street of a city will work material injury to the abutting property owners, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall be first acquired, under proceedings instituted against such owners as required by law for the appropriation of private property.

"2. In such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses."

Quoting from the above case as appears in the opinion of Judge White on page 45, the learned judge says:

"It seems to us it can make no material difference where the fee is vested, so long as it is held to the same defined uses.

The established doctrine in this state, is, that the abutting lot owners 'have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself.' "

We find the same doctrine in the case of *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 282 (62 N. E. Rep. 341; 87 Am. St. Rep. 600), Judge Minshall says:

"The decisions in this state have clearly established that an abutting lot owner has such an interest in the portion of the street on which he abuts, that the closing of it up, or the im-

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pairment of its use as a means of access, or the addition of a new burden, is a taking of private property for a public use, and cannot be done without compensation."

The evidence offered in the case at bar, and which is undisputed, is clear and conclusive and of such a nature and character that we have no doubt that the proposed track and crossing gates, if permitted to be placed on the street in question and in front of the lot and business property of the plaintiff, would materially damage his property and impair his right to the use of said street.

In view of these facts and applying the well established principles of law to them as herein before stated and set forth, a majority of this court is of the opinion that the plaintiff is entitled to the relief prayed for in his petition and therefore the motion filed by the defendant herein to dissolve the permanent injunction allowed by the common pleas court in this case, is not well taken, and said motion to dissolve said injunction is hereby overruled.

Shields, J., concurs.

Powell, J., dissents.

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DAMAGES—EVIDENCE—PURE FOOD LAWS.

[Morgan (5th) Court of Appeals, May 14, 1915.]

Shields, Powell and Houck, JJ.

BOYD KEAN V. DELBERT RACHELOR.

1. Pure Food Criminal Statute does not Change Rules of Evidence in Action for Damages on Account of Sale of Food Unfit for Use.

The criminal statute relating to the sale of unwholesome provisions in no way changes the established rules of evidence or the proof required in cases where damages are sought on account of the sale and delivery of food products in a condition unfit for use.

2. Implied Warranty of Seller of Eggs not Available to Purchaser Receiving without Inspection though Found Four Days Later Unfit for Use.

The implied warranty of the seller, in the case of the sale of eggs, is not available as the basis of an action by the purchaser who received and shipped the eggs without inspection and which were found upon inspection four days later to be unfit for use.

[Syllabus by the court.]

**Kean v. Bachelor.****ERROR.**

*M. E. Danford*, for plaintiff in error.

*C. C. Middleswart*, for defendant in error.

**HOUCK, J.**

This cause was originally commenced in the court of a justice of the peace in and for Windsor township, Morgan county, Ohio, tried and judgment rendered and appealed to the common pleas court of this county.

The cause was submitted to a jury in the common pleas court and a verdict rendered and judgment thereon in the sum of \$90.34, in favor of the defendant in error, the plaintiff below, and to reverse this judgment the plaintiff in error prosecutes error to this court.

The plaintiff below, Delbert Bachelor, in his amended petition says, that on August 13, 1913, he sold and delivered to the defendant below, the plaintiff in error, and at his special instance and request, chickens and butter for the agreed price of \$84.52, and which sum the said Kean agreed to pay to him for same, but that he has neglected, failed and refused so to do. Plaintiff prays for a judgment against defendant for said sum of \$84.52 with interest at 6 per cent from August 13, 1913.

The defendant filed an amended answer, being in substance as follows:

That on and long prior to June 3, 1913, he was engaged in the produce business, buying and shipping eggs to Pittsburg; that on said day the plaintiff sold and delivered to him, as and for good and wholesome eggs, and for the agreed price then paid for same, a large lot of eggs packed by plaintiff in cases, for shipment by defendant to Pittsburg, and with the knowledge on the part of plaintiff that they would be so shipped, without inspection or examination by defendant, and they were shipped by him without inspection; that 401 1-2 dozens of said lot of eggs were unhealthy, decayed and spoiled; but said condition of said eggs was not made known at said time to defendant by plaintiff, nor did defendant know of their condition; that by reason of the premises defendant has been damaged in the sum

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of \$74.28, for which amount he prays judgment against the plaintiff.

The plaintiff's reply admits that he sold and delivered the eggs to defendant at an agreed price which was paid; that they were packed in cases but denies each, all and every other statement and allegation in the amended answer of defendant.

The plaintiff in error seeks to reverse the judgment below for two reasons:

1. He relies upon the provisions of Sec. 12760 G. C.
2. That the court erred in its charge to the jury.

Section 12760 G. C. is as follows:

"Whoever sells, offers for sale or has in possession with intent to sell, diseased, corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars or imprisoned twenty days, or both."

Counsel for plaintiff in error contends, that by the provisions of the above penal statute, decayed and unwholesome eggs must not be placed upon the market; that they are not the legitimate subject of sale and traffic, unless their condition is made known to the buyer; that no express warranty is necessary, nor is any false representation or deceit requisite, nor is knowledge upon the part of the seller necessary to be alleged or proved by the defendant below.

The action at bar is a civil one and not of a criminal nature, and we think it is a well established principle in law that one who pursues a civil remedy can not claim favor under the provisions of a criminal or penal statute to make out his case. The criminal statute in question does not change in any way the well established rules of evidence, or the proof required in cases growing out of the sale and delivery of merchandise where damages are sought, nor does it change the rule of law governing express or implied warranties, as relates to the seller and buyer of merchandise.

Then we are led to inquire, what is the law governing the case at bar?

In the absence of any express affirmation or statement to



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such effect, certain warranties are always implied in every contract, relating to the sale and purchase of merchandise.

There is an implied warranty that the seller is the owner of the goods which he offers for sale, and that he has the right to sell the same; that at the time and place of delivery the buyer shall have and enjoy quiet possession of the goods and that the same will be free from any charge or claim of any third person.

And we are of the opinion that from the usages of trade that where eggs were sold, as in this case, to a shipper when the opportunity for inspection is slight, if at all, that there is an implied warranty from the seller to the buyer, that the eggs are fit for the purpose for which they are sold, *i. e.*, shipping purposes, and that they are merchantable and not spoiled or decayed at the time of their delivery to the purchaser.

We are now led to inquire—what was the condition of the eggs, involved in this case, at the time of their delivery to the plaintiff in error?

The record discloses that the eggs were purchased by Bachelor of farmers in his community, during the week prior to June 3, 1913, and they were packed in egg cases and delivered on that day to Kean, the purchaser; that the fillers were dry, but the cases a little wet; that Kean saw the damp cases but did not open any of them or inspect any of the eggs but accepted them and shipped them the same day to Pittsburg; that four days later he was informed, by consignee in Pittsburg, that a large part of the eggs he purchased of Bachelor were spoiled and decayed.

Can it be inferred from these facts that the eggs were spoiled, decayed and unmerchantable, on June 3, when Bachelor delivered them to Kean, because four days later they were in that condition in Pittsburg?

The purchaser had an opportunity to examine the eggs when they were delivered to him, but he did not elect so to do; he saw that the cases were damp, but made no complaint to the seller; if the dampness of the cases would have a tendency to cause the eggs to decay or spoil more rapidly, by reason of that

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fact, the purchaser was placed upon inquiry and should have applied the test, or made an inspection of the eggs, and if he had done so and found them decayed or spoiled he would have been under no legal obligation to have accepted them.

Speaking from the record, the evidence does not show that at the time of the delivery of the eggs, on June 3, 1913, that they were spoiled, decayed or unmerchantable and we can not assume from the facts and circumstances, as disclosed by the evidence, that they were spoiled or decayed at said time.

All the law required of the seller in this case was that the eggs should be merchantable and not in an unwholesome condition, at the time of the delivery, and that there could be no implied warranty that they would be merchantable, or free from decay four days later and after the purchaser had shipped them to Pittsburg.

The question to be determined here is not the condition of the eggs at Pittsburg, but what was the condition of the eggs on June 3, 1913, when Kean accepted them from Bachelor?

Answering this inquiry from the evidence as disclosed by the record, they were merchantable and not decayed or spoiled and that is all that the law requires of the defendant in error in the premises.

We have examined the charge of the court and we are of the opinion that it is a clear and concise statement of the law governing the facts in this case, and therefore we find no error in the charge of the court.

As we view this case, we find no error in the record, which is prejudicial to the rights of the plaintiff in error, and, therefore, we are of the opinion that the judgment below is right and should be affirmed. The judgment of the common pleas court is affirmed at the costs of the plaintiff in error.

**Shields and Powell, JJ., concur.**

*Hawkins v. Railway.*

### MASTER AND SERVANT.

[Cuyahoga (8th) Circuit Court, February 21, 1905.]

Marvin. Winch and Henry, JJ.

\*JENNIE HAWKINS, ADMR. V. LAKE SHORE & M. S. RY.

**Failure to Instruct Employee Engaged in Dangerous Work not Actionable Unless Failure Caused Accident.**

Evidence that an employer failed to instruct an employee as to hazard of employment, and that the latter was killed by an accident in the discharge of his duty, is not sufficient to go to a jury where there is no evidence that the failure to warn caused the accident.

**ERROR.**

*C. W. Dille, E. J. Pinney and C. W. Noble*, for plaintiff in error.

*Brewer, Cook & McGowan*, for defendant in error.

**WINCH, J.**

Plaintiff in error was plaintiff below and brought her action against defendant to recover damages for the death of her son, which she alleges was caused by the negligence of defendant. The case has been twice tried by jury. The first trial resulted in a verdict for the plaintiff, which this court set aside on the ground that the verdict was not sustained by sufficient evidence and remanded the cause for a new trial. The opinion of the court at that time sufficiently set forth the facts of the case and the conclusions of the court, rendering extended comment upon the case at this time unnecessary.

Attention, however, is called to what was then said that:

"The testimony fails utterly to show the manner of his (Hawkins') death. \* \* \* The testimony fails to show that the accident was caused by peril of which it was the duty of the company to instruct the decedent, or that a failure to give such instructions was the proximate cause of his death."

The case was tried a second time in the common pleas court and at the close of plaintiff's testimony the trial judge directed

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\*Affirmed, no op., *Hawkins v. Railway*, 74 O. S. 424.

## Cuyahoga County Circuit.

a verdict for the defendant, to review which ruling the cause is here a second time.

While some additional evidence was introduced at the second trial, it is all along the line of establishing a basis for the presumption that the deceased was upon the top of the car just before the accident occurred which caused his death. With all this additional evidence, after able and exhaustive arguments by skillful counsel and a careful consideration of the evidence, we are unable to come to any other conclusion than that quoted from the former opinion of this court.

The only facts established at the last hearing were: that George Hawkins was a brakeman of little experience; an accident happened; Hawkins was killed. There was also evidence tending to show that defendant failed to fully instruct decedent as to the perils of his occupation, but as to the cause of Hawkins' death and that it was due to failure of the company to instruct him of the peril which came upon him and killed him, there was no proof. The negligence complained of was this failure to properly instruct.

The trial court evidently followed the last ruling of this court and was justified in so doing. The mere fact of the accident did not raise a presumption of negligence on the part of the defendant. *Huff v. Austin*, 46 Ohio St. 386 [21 N. E. Rep. 864; 15 Am. St. Rep. 613].

There is no presumption that neglect to instruct as to hazards of the employment was the cause of the injury in the absence of proof as to the physical cause of the accident. The theory upon which the case was presented is that a car upon the top of which Hawkins was standing became uncoupled by reason of a defective coupler, collided with another car backed into it by the engineer and precipitated Hawkins between the two cars, because he was uninstructed as to what to do under the circumstances and for that reason did not know how to save himself.

Circumstances were shown in evidence from which it might be deduced that Hawkins was on top of the car just as the accident occurred, but they are not conclusive of that fact. A noise

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was heard "as of cars coming together," from which it might be inferred that the two cars came together violently; one of them was knocked off the center of its rear tracks—but that they had been uncoupled without Hawkins' knowledge or active participation therein, there was no proof. They were properly coupled before and after the accident. There was no defect in the couplers shown. That Hawkins was precipitated between the two cars may be presumed from circumstantial evidence in the case, but other circumstances shown, particularly the position of the body when found, would lead to an equally natural inference that he was on the ground, stepped between the two cars, to climb to the top of one of them, and slipped or stumbled and fell under the wheels. Nor is it to be inferred from the evidence, seeing that the evidence as to the physical cause of the accident is largely inferential, that the company could have given Hawkins any amount of instruction as to the peril he actually encountered, which would have saved his life.

Such being the character of the evidence at the last trial, it would have been error for the trial judge to submit the case to the jury for its speculation as to the cause of the accident and the negligence of the defendant. *Lake Shore & M. S. Ry. v. Andrews*, 58 Ohio St. 426 [51 N. E. Rep. 26]; *Cleveland Term. & V. Ry. v. Marsh*, 63 Ohio St. 236 [58 N. E. Rep. 821; 52 L. R. A. 142]; *United States v. Ross*, 92 U. S. 281 [23 L. Ed. 707]; *Gerwe v. Fireworks Co.* 5 Circ. Dec. 616 (12 R. 420); *Connell v. Manufacturing Co.* 10 Dec. Re. 129 (19 Bull. 22).

Judgment' affirmed.

Marvin, and Henry, JJ., concur.

## Hamilton County Appeals.

## ADVANCEMENTS—EXECUTORS AND ADMINISTRATORS.

[Hamilton (1st) Court of Appeals, December 13, 1913.]

Swing, Jones and Jones, JJ.

AARON A. FERRIS, EXECUTOR V. JAMES GOODIN ET AL.

## 1. Receipting for Draft Endorsed as Charge Upon Expectancy in Testatrix's Estate Evidences Advancement.

Endorsement of a draft by testatrix to her sister and receipt of the same by the latter as a charge on account of her future interest in testatrix's estate, evidence an advancement and not a gift, notwithstanding the proceeds were for the benefit of the daughter of endorsee, a niece of testatrix.

## 2. Parol Evidence Incompetent to Explain Written Receipt of Draft Charging Drawee's Expectancy as Gift to Her Daughter.

A written receipt of draft as a charge upon her expectancy in testatrix's estate cannot be disregarded or explained by parol evidence tending to show that the money was intended as a gift to the daughter of drawee.

*Aaron A. Ferris, Rufus B. Smith and Bruce & Bruce, for plaintiff.*

*John C. Healy, for defendants.*

## JONES, O. B., J.

This is a proceeding brought by the executor and trustee under the will of Elizabeth Zinn, under Sec. 10857 G. C., asking the direction and judgment of the court as to whether the sum of \$2,000 should be treated as a gift to Virginia G. Ellard, a sister of said deceased, or as an advancement to be charged against her interest in said estate.

The will of said Elizabeth Zinn was made August 10, 1906, and provided for certain legacies and trusts, dividing the residue of the estate into five equal parts, one of which was given to a brother, one to a sister, and the other shares in trust for the benefit of another sister, certain nieces and nephews and other relatives. Mrs. Zinn died February 28, 1908.

It is claimed by the executor and trustee and on behalf of certain legatees and beneficiaries under the will that the share

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of Mrs. Ellard should be charged with \$2,000 which was paid by New York draft drawn by the Merchants' National Bank, dated May 20, 1907, and payable to the order of Mrs. Elizabeth Zinn. This draft was procured for Mrs. Zinn by A. A. Ferris, who was then acting as her attorney and managing her business affairs, and it was endorsed by Mrs. Zinn to the order of Virginia G. Ellard, and endorsed by Mrs. Ellard to the order of Mary E. Hoffman, her daughter, who collected the money thereon.

It appears that this draft was procured by Mr. Ferris and was sent by him with a letter to Mrs. Zinn, dated May 20, 1907, in which he advised her not to endorse the draft in blank but to make it payable either to Mrs. Ellard or to Mrs. Hoffman as she might prefer. In this letter he also transmitted to Mrs. Zinn the form of a note which he explained in the following language:

"Also find enclosed the form of a note which should be signed by Mrs. Ellard, as to money is really advanced for her. It is a matter of business, in the sense of advancing the money at least, and therefore you should have written evidence that the money has been advanced, and a note is the best form in which to have the acknowledgment."

Mrs. Zinn after receiving this draft from her attorney endorsed it as above stated and delivered it to Mrs. Ellard, requesting her to sign the note. Mrs. Ellard retained the draft but declined to sign the note. Mrs. Zinn on the following day reported to her attorney the refusal of Mrs. Ellard to sign the note and authorized him to stop payment on the draft until some satisfactory acknowledgment was received from Mrs. Ellard of the money so paid.

Under this direction and authority Mr. Ferris, acting for Mrs. Zinn, stopped payment of the draft and wrote Mrs. Ellard advising her of this fact and enclosed in his letter a blank form of receipt, stating in his letter that "the draft will not be paid until there is some written acknowledgment from you of the receipt of money," and saying:

"I enclose herewith a blank form of receipt. You can, if

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you please, fill it out yourself giving the form of it, it being only necessary that you should express in some words that you have received the \$2,000. When such receipt is delivered to Mrs. Zinn and she notifies me to that effect I will countermand the order stopping payment on the draft."

Mrs. Ellard then filled up and returned to Mr. Ferris her receipt in the following words:

"CINCINNATI, May 23, 1907.

"Received of my sister Elizabeth Zinn her draft for \$2,000, on account of my future interest in her estate.

"(Signed) VIRGINIA G. ELLARD."

The attorney after receiving this receipt from Mrs. Ellard advised Mrs. Zinn that he had satisfactory acknowledgment from her, and thereupon under Mrs. Zinn's authority countermanded the order stopping payment on the draft, and the money was paid.

The testimony was received on behalf of Mrs. Ellard, subject to the objection and exception of the other side, tending to show a gift by Mrs. Zinn to her niece, Mrs. Hoffman, who was the daughter of Mrs. Ellard, of this \$2,000 to be used by her in the purchase of a house.

It is a well settled principle of law that parol evidence can only be admitted to set aside such an instrument as the receipt made by Mrs. Ellard upon the ground of fraud or mistake. No such claim is made by her here in her pleadings. She seeks only to explain the receipt, or to have it disregarded by the introduction of evidence tending to show that the money was not in any way intended for her but was to be a gift to her daughter. This parol evidence can not be received to contradict the written instrument. *Jackson v. Ely*, 57 Ohio St. 450 [49 N. E. Rep. 792]; *Cassilly v. Cassilly*, 57 Ohio St. 582.

Indeed even if this evidence might be considered by the court, we do not feel that it would be sufficient to cause the delivering of the draft to Mrs. Ellard to be construed as an



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outright gift to Mrs. Hoffman which could in no way affect the ultimate share of her mother. Especially so when we consider the manner in which the draft was endorsed and the form of the receipt.

The effort of the defense has been to show that the idea of making this payment a charge upon Mrs. Ellard's share was one originating solely with Mrs. Zinn's attorney. But both Mrs. Zinn and Mrs. Ellard were clearly advised of it. Mrs. Zinn acted upon her attorney's advice, and even though she did not herself see the receipt as finally written she was informed of its effect and was satisfied. And Mrs. Ellard, although she refused to sign the note, voluntarily made out and signed the receipt and did not undertake to appeal from Mr. Ferris to Mrs. Zinn to have the matter put in what she now claims to be its true character. So having agreed to the transaction as it was carried out, she must now be bound by it.

The general rule as to ademption is that it is wholly a matter of the intention of the testator. Where a legacy is given by a testator to a child or to one to whom he stands *in loco parentis*, a subsequent payment made to such child or person will raise a presumption of an intention on the part of the testator to adeem the legacy, while such a payment made to a person not in the relation named will not raise such a presumption, but the intention to charge the payment against the legacy must then be proved (40 Cyc. 1915, and cases cited).

In the opinion of the court, however, the intention of the parties is conclusively shown by the manner of the payment and the form of the receipt given for it by Mrs. Ellard, so long as that receipt is not set aside.

Under the common law the mere expectancy or charge of succeeding to an estate is held not to be the subject of release or assignment, *Needles v. Needles*, 7 Ohio St. 432 [70 Am. Dec. 85], but that rule has been relaxed in equity, *Rosenthal v. Mayhugh*, 33 Ohio St. 168. And an heir apparent or one who is named as a legatee under the will, who has received a valuable consideration from the ancestor or testator under an

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agreement by him that same be charged against his future interest in the estate, is held to his contract by way of estoppel.

A case directly in point is that of *Goodson v. Goodson*, 31 O. C. C. 627 (12 N. S. 158).

Other cases where such estoppel is held are: *Low v. Low*, 77 Me. 37; *Callicott v. Callicott*, 43 So. Rep. 616 (Miss.); *Vreeland v. Vreeland*, 65 N. J. Eq. 668 [56 Atl. Rep. 1089]; *Garcelon's Estate. In re*, 104 Cal. 570 [38 Pac. Rep. 414; 32 L. R. A. 535; 43 Am. St. Rep. 134].

In the opinion of the court, therefore, it is the duty of the executor in the distribution of said estate to charge against the share of Mrs. Ellard the sum of \$2,000. Decree accordingly.

Swing and Jones, E. H., JJ., concur.

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DEDICATION—ADVERSE POSSESSION.

[Licking (5th) Court of Appeals, May, 1914.]

Voorhees, Shields and Powell, JJ.

\*NEWARK (CITY) v. HARRIET B. CRANE ET AL.

NEWARK (CITY) v. JAMES W. BURNETTE ET AL.

1. Land Dedicated for a Specific Use can not be Diverted to Other Uses.

Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions for the dedication as expressed the land can not be applied to any other use or the restrictions disregarded.

2. Municipality can not Hold as Trustee and Adversely.

A city holding land as trustee for the use of the public as a cemetery can not, at the same time, hold it adversely and for its own benefit.

3. Fee Remains in Heirs of Dedicator and upon Abandonment of Original Purpose Reverts.

Where land was dedicated to the town of Newark for a burying ground, and the city council of said town subsequently passed an ordinance prohibiting any further burials in the land so dedicated and ordering the removal of the remains buried therein, the ordinance was a valid exercise of the police power of the city and operated as a complete abandonment of the dedi-

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\*Reversed, no op., *Newark v. Crane*, 91 O. S. 000; 60 Bull. 271.

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cated use and the land would revert to the original owner, or his heirs. When the property is no longer desired, or the purpose for which it was dedicated attainable, it will revert to the dedicator.

4. Upon Abandonment by a Town of the Public Purpose of the Dedication of the Land, the Property Reverts to the Original Donor.

Upon abandonment by a town of the public purpose of the dedication of the land, the property reverts to the original donor.

5. City Abandoning Dedicated Use Denied Retention for Other Purposes.

Where a city or town has by its own act abandoned the use and violated the conditions specified in a deed, it can not retain the grounds for any other purpose.

6. Adverse Possession of Dedicated Land Cannot Arise from Permissive Use.

That a city may acquire title to land under the statute of limitations, by such adverse possession as is necessary to convey such title to land is not doubted; but the very foundation elements of adverse possession are wanting when the only possession is permissive possession for a dedicated use and while the city holds control of these premises as a graveyard the defendant could not take possession.

7. Fee not Conveyed by Common Law Dedication.

A common law dedication does not convey a fee.

8. Fee of Land Dedicated for Cemetery Uses Remains in Patentee and Heirs.

In the Burnette case the fee in the land never passed out of the heirs of the patentee, but was subject only to the use of the public as a cemetery, and where the city abandoned that use the premises revert to the descendants of the patentee free from the dedicated use. Such dedication, if there were any dedication, was a common law dedication, and its use would be merely permissive, and not adverse and the town or city of Newark would have no title and no other possessory rights; and the use and control of the grounds was not adverse to the dedicated use. In such case its use would not start the statute of limitations. Nothing but an open, notorious, visible, hostile and inconsistent act of possession could have that effect.

[Syllabus by the court.]

**ERROR.**

*Ralph Norpell*, city solicitor, and *Fitzgibbon, Montgomery & Black*, for plaintiff.

*Owen Nash and Craighead & Van Pelt*, for defendants.

**VOORHEES, J.**

These cases were submitted together.

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It will be sufficient in order to present the real issues in this case to state the following facts:

In January, 1801, a patent was issued to John Cummings, John Burnette and George W. Burnette, for section four, township two, range twelve, containing 4220 acres of land, and the premises embraced in the controversy in this suit, that is, the graveyard, were a part of said section.

On May 15 and 19, 1814, John and George W. Burnette having died, the heirs of George W. Burnette conveyed their interest in said premises to John N. Cummings and John W. Burnette and Harriet Burnette, heirs of said John Burnette.

On December 6 and 14, 1814, John W. and Harriet Burnette and John N. Cummings, deeded to William C. Schenck an undivided interest in said land, amounting to a one-third interest in the whole tract. The recitals in this deed and the other deeds mentioned exhibit the chain of title and the amount of their respective shares, and show the relation of the parties and their respective shares in said land.

On June 20, 1817, an amicable partition suit was begun between Cummings, Schenck and James W. and Harriet Burnette, for the partition of the residue of the lands which remained unsold. This land included both inlots and outlots in the town of Newark, Ohio. It is not claimed that the lands known as the graveyard were set off to anybody in said partition proceedings. The plat in partition record A, June term, 1817, of the court of common pleas of Licking county, Ohio, page 7, attached to the record on page 9 of the bill of exceptions shows the old graveyard.

The plat on page 7 in the record of said partition suit, is the only one of importance in this case. This plat shows the shape and boundaries of lot F, which was set off to the Burnettes, and which cornered on the graveyard. This plat also shows the three-cornered strip subsequently deeded to the town of Newark by Crane and wife, in 1848, "for the sole purpose of being used as a burying ground for the use of said town of Newark and for no other purpose whatever."

In all these conveyances and proceedings the body of the

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graveyard remained unchanged and undisposed of. Just when the graveyard was originally laid out as such is not disclosed, but it was a graveyard in 1871. It is not contended that it was ever deeded to any person or association for that purpose. The only deed is for the small three-cornered addition made in 1848. It is not contended or claimed that there was any statutory dedication or any proceeding to condemn or appropriate this ground for a graveyard and the right of the public to use it for such purposes arises, if at all, by way of common law dedication, based on the fact that the original owners permitted it to be used for that purpose.

On February 8, 1826, the town of Newark was incorporated, and the municipal authorities in November, 1868, prohibited any further burials in this graveyard.

On July 29, 1875, an ordinance was passed by the council of said town, among other things providing for notices to friends to remove the bodies buried therein by November 1 of that year, and authorizing the cemetery trustees to proceed after that date to have the bodies and tombstones removed.

On November 4, 1875, a resolution was passed referring the matter of removing the remains of parties buried in the old graveyard to a special committee consisting of the cemetery trustees and three citizens, which would indicate that the bodies had not been removed.

On September 20, 1877, a further resolution was adopted by said council, reciting the dilapidated condition of the cemetery, *et cetera*, and directing the trustees to expend some money to repair and improve the cemetery. These proceedings were reported to the cemetery board and it employed two persons to make a plat of the ground and graves, taking care to preserve the monuments and tombstones, so that the same and the remains might be removed and the ground leveled off. A plat was prepared, beginning with the year 1850, under date of 1878.

On April 14, 1882, the board of education of Newark instituted a proceeding against the trustees of Newark township and the city of Newark and the unknown heirs of Cummings,

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Burnette, Crane and Schenck, to condemn the ground known as the old graveyard for a school house site. A jury was impaneled and a verdict returned assessing the value of the premises in three tracts aggregating \$7,500. In that proceeding the then solicitor of the city filed what he called an answer, asserting that the city was the real owner.

The heirs of Cummings, Burnette, Crane and Schenck, also filed an answer alleging that they were the owners in fee of the property. The court ordered that when the money was paid in the respective rights thereto should be determined. The board of education never paid in the money and there the matter rested.

In 1888 the picket fence, which had been put up in 1878, was removed and put up in Cedar Hill Cemetery. Instead of removing the gravestones, as had been ordered in 1878, those doing the work laid them down in the graves and covered them up. One monument still remains standing. How many old graves are still in the ground can not be now definitely known; but the testimony shows that many of these graves and gravestones are very, very old.

In the reply and testimony in the Crane case it was shown that most of all the burials in the cemetery were before the date of 1848, and Mr. Vanatta says, "that with no burials since 1860 or 1868, very little can be left of any remains; all or nearly all have necessarily disappeared."

On September 11, 1905, the council of said city of Newark passed an ordinance selecting these grounds as a site for a proposed municipal hospital.

On March 6, 1906, these suits were brought by the city to quiet its alleged title in fee, claiming, in the Burnette case, that it has ever since November 20, 1868, been in the open, exclusive, adverse and visible possession of the premises involved in that suit (the Burnette suit), and has thereby become owner, and in the Crane case claiming ownership under the deed of the date of February 14, 1848. These claims the defendants absolutely deny.

In 1909, while these cases were pending and after the an-

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swers had been filed, the plaintiff city entered on the premises, laid cement walks diagonally across the same, built a fountain in the center; laid pipes, and strung electric wires, claiming that the premises had become a common and public park. These structures were put up on the premises for the purpose of improving them as the Sixth street park, as stated in the proceedings of the board of public service by the resolutions of July 6, 15 and 24, 1909. The photographs introduced in evidence tend to show the grounds now to be a park and that the city has completely abandoned the use of these premises as a cemetery.

The facts admitted in the pleadings may be summarized as follows:

In the Crane case:

1. Burials have been prohibited since 1850.
2. Burials were prohibited by ordinance in 1868.
3. The Crane deed of 1848 contained restrictions as to the use of the land, stating that it should be used for the sole purpose of a "burying ground, for the use of said town of Newark, and for no other purpose whatever."
4. That as early as 1850, Cedar Hill Cemetery was used.
5. That in 1868 and 1875 remains were ordered removed to Cedar Hill.
6. That the school board instituted proceedings in 1882 to appropriate said land for school purposes.
7. That fences around the graveyard were ordered removed in 1888.
8. An ordinance was passed by the council to establish a hospital in 1905.
9. A resolution was passed by the council ordering that the remaining bodies and the tombstones be removed.
10. A fountain and other structures for a park were erected by the city.
11. Most of the bodies had been buried in said cemetery prior to 1848.

In the Burnette case:

1. Burials were prohibited as early as 1850.

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2. Burials were prohibited by ordinance in 1868.
3. The premises were used as a burial place from 1817 to 1868.
4. Cedar Hill was established about 1850 and has ever since been continuously used as a graveyard.
5. Burials in said cemetery in the Burnette lands or premises were prohibited in 1868.
6. All remains and tombstones were ordered removed in 1875.
7. Proceedings of the board of education to appropriate the premises for school purposes were instituted in 1882, but never completed.
8. The fences around said cemetery were removed in 1888.
9. Proceedings were had by council to appropriate said premises for a hospital site, but never consummated.
10. A fountain and other structures for a park were erected by the city on the premises.

It is unnecessary to go into detail as to the various acts and proceedings had by the town of Newark with reference to the lands and premises involved in these suits. For the purposes of this opinion, it will not be necessary to refer to the facts, ordinances, resolutions and acts of the town of Newark, further than to say that the only deed executed was the Crane deed, of 1848, for the three-cornered strip.

At the January term of the court of common pleas, to wit, January 25, 1912, it was ordered, adjudged and decreed, among other things, that the petitions of the plaintiffs in cases numbered 13789 and 13790 be, and the same were dismissed.

The causes came into this court on appeal from the court of common pleas. They have been ably argued by council on both sides by briefs, as well as by oral argument. In the short time this court has had to consider the questions involved, and to assign reasons for its conclusion, it can not be expected that we will go into much detail in stating our conclusions.

By the deed executed in 1848, by Crane and wife to the said town of Newark, the three-cornered strip, shown by the



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plat, was deeded "for the sole purpose of a burying ground and for no other purpose whatever." This conveyance was to the municipal corporation of the town of Newark, for a public purpose, namely: for a burial ground, and for no other purpose. The town of Newark abandoned said premises as a burial ground, as shown by the various acts of the municipality and, therefore, the title reverts to the original owners or their heirs, by the plain terms of the deed.

In the case of *South Park (Comrs.) v. Ward & Co.* 248 Ill. 299 [93 N. E. Rep. 910; 21 Ann. Cas. 127], it was held:

"Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions, if the dedication is accepted the land can not be applied to any other use or the restrictions disregarded."

In the case of *Kansas City v. Scarritt*, 169 Mo. 471 [69 S. W. Rep. 283], syllabi 1 and 2 are as follows:

"1. A square was marked 'donated for graveyard,' on an original plat filed by the owner with the recorder of deeds. Five years later a city was incorporated, including within its limits the graveyard. Held: That the legal title to the square remained in the original owners, subject to the use of the public, for the purpose of dedication; it not having passed to the city by dedication, as the latter was not in existence at that time.

"2. A city holding land as trustee for the use of the public, as a cemetery, can not at the same time hold it adversely and for its own benefit."

*Newark v. Watson*, 56 N. J. Law 667 [29 Atl. Rep. 487; 24 L. R. A. 843], syllabus 2:

"The plaintiff, a municipal corporation, held lands under a grant from the proprietors of East Jersey for burial purposes, to be appropriated for no other use or uses whatsoever. An ordinance of the municipality and an act of the legislature prohibited the use of such lands for burial purposes. Held: That the title to the lands thereby reverted to the proprietors."

In the case of *Fulton v. Mehrenfeld*, 8 Ohio St. 440, we find the following citations:

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"Where land was dedicated to the city of Youngstown for a burying ground, and the city council of Youngstown subsequently passed an ordinance prohibiting any further burials in the land so dedicated, and ordering the removal of all remains buried therein, the ordinance was a valid exercise of the police power of the state and operated as a complete abandonment of the dedicated use, and the land would revert to the original owner or his heirs. *Young v. Commissioners*, 7 O. F. D. 171 [51 Fed. Rep. 585, 591]; *Mahoning Co. (Comrs.) v. Young*, 9 O. F. D. 202, 206 [59 Fed. Rep. 96; 8 C. C. A. 140; 16 U. S. App. 588].

"When the property is no longer desired, or the purpose for which it was dedicated attainable, it will revert to the dedicator." *Louisville & N. Ry. v. Cincinnati*, 76 Ohio St. 504.

"Upon abandonment by a town of the public purpose of a donation of the lands, the property reverts to the original donors." 75 Miss. 846; *Patrick v. Y. M. C. A.* 120 Mich. 185 [79 N. W. Rep. 208].

In the Crane deed, the language was: "for the sole purpose of being used as a burying ground for the use of the town of Newark, and for no other purpose whatever."

These authorities make it clear that when the city abandoned the use of the premises conveyed as a burying ground, and attempted to divert them, first, to a schoolhouse site, later to a hospital site, and afterwards to a park, the title reverted to the heirs of Mrs. Crane, the grantor.

The city has, by its own unequivocal acts, abandoned the use and conditions specified in the Crane deed, and can retain the ground for no other purpose.

The Burnette case:

As to the Burnette case, we find: That the fee in the land in this case never passed out of the heirs of the patentee. It has always been in them, subject merely to the use of the premises as a cemetery; that by plain and unequivocal acts, the city has abandoned that use; that the premises have reverted to defendants free from the dedicated use.

The dedication of the Burnette tract, in case No. 1300 (if

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there was a dedication), was a common law dedication, and its use was merely permissive and not adverse. When these graveyard grounds came into the corporate limits of the town of Newark, it had no title and no other possessory rights. The use and control of the grounds was not adverse but in entire harmony with the dedicated use. Hence, its use did not start the statute of limitations. Nothing but an open, notorious, visible, hostile and inconsistent act of possession on the premises could have that effect, and no such act was done, or is claimed to have been done.

In 1888 the city took the fence down, threw the premises open to intruders and trespassers, and never after that sought to guard or protect the grounds, or to respect their character and sacredness as a burial place. This was an abandonment of the dedicated use.

***Kansas City v. Scarritt, supra:***

"That a city may acquire title to land under the statute of limitations by such adverse possession as is necessary to confer such title is not doubted; but the very foundation elements of adverse possession are wanting when the only possession is permissive possession for a dedicated use. And of course while the city held control of this as a graveyard, the defendants could not take possession."

***Patrick v. Y. M. C. A. supra:***

"A common law dedication does not convey a fee."

Syllabus 6, *supra*, is as follows:

"A church society, having accepted lands for a period of time under a common law dedication to its use, executed a quit-claim deed to a certain person who had previously purchased the reversionary interest of a part of the dedicator's heirs, and who conveyed the land to a Young Men's Christian Association, which built a valuable building on the land.

"*Held*: No evidence of hostility and the assertion of an adverse claim entitling the association to claim the land as against the dedicator's other heirs by adverse possession."

Syllabus 7:

"After a church society had erected a building on a lot

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dedicated to the use of one of the first four religious denominations forming a society in the town and erecting a building on the lot, it conveyed the lot to a Young Men's Christian Association, which demolished the church building and erected a building adapted to its own wants.

"*Held*: An abandonment of the use for which the lot was dedicated, entitling the holders of the reversionary interest to the lot."

*Campbell v. Kansas*, 102 Mo. 326 [13 S. W. Rep. 897].  
Syllabi 1, 2, 3, 4 and 5 are as follows:

"1. A square was marked 'donated for graveyard' on an original plat not assigned or acknowledged by the proprietors of a town site, but filed with the recorder of titles by one of them, who soon after used it at a public sale of lots. The plat, and the use of the land for interments were acquiesced in by the proprietors. *Held*: Sufficient evidence of a dedication *in pais*.

"2. The donors of land dedicated to a city for a graveyard have, while the public use lasts, no right to a concurrent possession subject to a reasonable use of the public, and can not maintain ejectment against the city to recover such a possession.

"3. Land dedicated to a city for a cemetery, which has no longer the character and name of a graveyard, but is used as a public park reverts to the donor, who may recover in ejectment against the city, which in defense denies the abandonment.

"4. In such case, the question will not be considered whether the land can be appropriated and used for other charitable purposes germane to the original one, in accordance with the equitable doctrine of *cy pres*.

"5. In 1857, land in a city, dedicated and used as a cemetery was by ordinance 'vacated for graveyard purposes.' In 1866, the council, by published notice, required all who had friends buried there to remove the remains. Many removals were made, but the majority of the remains were left to be taken away by the city. In 1869 it was used by the workhouse force breaking rock. In 1870, earth was taken from it, and used to

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fill a street. In 1877, the city engineer was instructed by ordinance 'to grade the old graveyard and get it into shape for a public park.'

"This was done the next year. The grading went below all the graves, except, perhaps, a few in the lower part, on which four to ten feet of earth were placed. Trees were planted, grass grown, and walks laid out. It was named and recognized by the city as a park. No visible grave or monument remained. During the final grading, in 1878, the removal of the remains exhumed was stopped, and the bones of from eleven to eighty-four bodies were reinterred, in small boxes, as near the places from which taken as possible. Small stones, bearing numbers, but no names, were at these points either put five or six inches under ground, or they had sunk to that depth at the time of the trial, shortly before which the location of many of them was brought to light by agents of the city by 'prospecting through the park with a sharp iron rod.' *Held*: Sufficient evidence of abandonment."

Without pursuing the discussion further, we are of the opinion that the city or town of Newark has no right, title or interest in these premises, in either case, and that the petitions should be and they are dismissed, at the costs of the plaintiff.

It is therefore ordered by the court that said plaintiff remove all of said pipes, poles, electric wires, cement walks, and the fountain from said premises, and restore the same to the condition that they were in before such pipes, poles, electric wires, cement walks and fountain were placed in and upon said premises, and that the same be done within six months from the date hereof.

It is further ordered that a decree be drawn in accordance with the opinion of the court herein. *Exceptions.*

*Motion for new trial, if one is filed, overruled. Exceptions.*  
Ten days allowed for finding of fact and conclusions of law.  
Statutory time for bill of exceptions.

**Shields and Powell, JJ., concur.**

## Summit County Circuit.

## APPEAL—PARKS.

[Summit (8th) Circuit Court, April 15, 1907.]

Winch, Marvin and Henry, JJ.

MARY V. MILLER v. AKRON (CITY).

Appeal Lies to Probate Court Order Assessing Damages for Land Appropriated by Municipality.

An appeal under Secs. 2254, 6407, 6408 R. S. (Secs. 3696, 11206-11209 G. C.), may be had to the common pleas court from a decision of the probate court assessing compensation to be paid by a municipality for land appropriated by it for park purposes.

ERROR.

## WINCH, J.

The sole question raised by these proceedings in error is whether an appeal lies to the common pleas court from a verdict and judgment in the probate court, assessing the compensation to be paid for land appropriated by a municipality for park purposes.

Previous to the enactment of the municipal code in October, 1902, the right of appeal in such cases was granted by Sec. 2254 R. S., and the manner in which such appeal might be perfected was prescribed by Secs. 2255 to 2259 inclusive. The new municipal code re-enacted the provision of Sec. 2254, granting the right of appeal (Sec. 3696 G. C.), but repealed the other sections specifying the manner in which the appeal might be perfected. From this situation the city solicitor concludes that such cases no longer be appealed, and he is right in his conclusion and sustained by a former ruling of this court in the case of *State v. Hanousek*, 10 Circ. Dec. 516 (19 R. 303), unless other sections of the statutes provide the method of bringing such cases into the appellate court. Manifestly the legislature did not intend to take away the right of appeal, and was of the opinion that other sections fully provide the procedure in appeal, for otherwise it would not have reenacted Sec. 2254. Having in mind this intention of the legislature and its judgment, we are called upon to examine Secs. 6407 and 6408 R. S. which plaintiff in error claims are applicable to this case.

## Miller v. Akron.

Section 6408 provides what steps shall be taken by "the person desiring to take an appeal, as provided in the preceding section."

Section 6407 provides: "In addition to cases specially provided for, appeals may be taken to the common pleas court," from the probate court in eight classes of cases, to no one of which this case belongs.

In addition to cases brought in the probate court by municipalities for the appropriation of land, there are several other statutes which provide the right of appeal in special cases. Some of these statutes provide that the appeal shall be perfected "as in other cases," undoubtedly referring to Sec. 6408 *et seq.*, and some set forth the procedure.

From this we conclude that the general procedure on appeal is regulated by Sec. 6408, for all cases where special procedure is not provided. To hold otherwise and to limit the application of the provisions of Sec. 6408 to the eight classes of cases as to which the right of appeal is "provided in the preceding section," *i. e.*, Sec. 6407, would be to take away the right of appeal in many cases by a strict and literal reading of a legislative act, without regard to the manifest intention of the legislature. We see no necessity for so holding, and thus nullifying not only Sec. 1536-114 which governs this case, but many other statutes of like import.

The Hanousek case is not in point. When the legislature created the insolvency court in Cuyahoga county, and provided that appeals might be taken to it from judgments of justices of the peace, without providing how such appeals should be taken, there were no other statutes applicable to the case, and the court properly held:

"If the jurisdiction is conferred by statute, then the court, if no method is prescribed for bringing a case before it on appeal or error, is powerless to prescribe any method by rules or regulations, either in matters of appeal or matters of error, and such court acquires no jurisdiction of such cases."

In the case at bar the only question is whether the general procedure as prescribed by statutes in force, regulating appeals

## Summit County Circuit.

from the probate court to the common pleas court, apply where the intention of the legislature is manifest that they should apply, but the wording of the law is doubtful.

The right to appeal being plain, a liberal construction should be put upon the law providing the remedy.

We therefore hold that plaintiff in error was entitled to appeal her case to the common pleas court, and that the said court erred in dismissing her appeal.

Judgment reversed, and cause remanded to the common pleas court for further proceedings.

Marvin and Henry, JJ., concur.

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**PAYMENT—PRINCIPAL AND AGENT.**

[Hamilton (1st) Court of Appeals, March 4, 1914.]

Swing, Jones and Jones, JJ.

THOMAS L. EVANS V. JAMES P. VAUGHAN ET AL.

**Payment of Principal and Interest at Office of Attorney Conformably to Statement in Note Held Payment to Principal under Equitable Rule.**

Payment of interest for several years and finally, the principal sum of a promissory note to an attorney, later absconding, at whose office the note itself makes it payable, and from whom the maker received the loan, the maker and payee never having met or consulted with each other, brings an action for recovery thereof within the rule with reference to innocent parties the carelessness of one of which is responsible for the loss, and is properly submitted to a jury under proper instructions, the verdict of which for the maker will not be disturbed on review. Nor is it error to exclude answer of payee as to whether he authorized such attorney to collect the principal of the note.

**ERROR.**

*Overbeck, Kattenhorn & Park*, for plaintiff in error.

*G. C. Wilson*, for defendant in error.



**Evans v. Vaughan.****JONES, E. H., J.**

The action in the court below was upon a note for \$700 secured by a mortgage. The following is a copy of the note sued upon:

“\$700.00.

CINCINNATI, O., March 21st, 1905.

“Two years after date I promise to pay to the order of T. L. Evans, seven hundred dollars. Payable at the law office of J. E. Humphreys, Cin. O., value received with interest at 6 per cent. per annum payable semi-annually. Privilege given to pay all at end of one year. (Signed) JAMES P. VAUGHAN.”

The endorsements on this note showed payment of interest to September 21, 1910. The plaintiff asked judgment below for the principal and interest from September 21, 1910, and also asked for foreclosure of the mortgage given to secure the payment of this note.

Defendant James P. Vaughan in his answer pleaded payment. The evidence showed that he had paid the semi-annual installments of interest as they became due, to September 21, 1910, at the office of J. E. Humphreys; that he has also paid upon the principal the sum of \$300 at the law office of J. E. Humphreys in Cincinnati, Ohio, on September 21, 1909, and paid the installments of interest as they became due upon the remainder of the principal; and that on November 10, 1910, he paid at the law office of J. E. Humphreys the sum of \$400 balance due on principal and also \$3 as interest, which, as he alleged, was all that was then due upon the note.

It is not contended by Mr. Vaughan that upon any of these occasions when he called at Mr. Humphrey's office to pay interest or principal, he saw the note. On the other hand, Mr. Evans, the payee of the note, testified that the note and mortgage were in his possession during all of this time. Mr. Vaughan says that on November 10, upon which date, as he thought, said note was fully paid, John E. Humphreys promised him to return properly canceled the note and mortgage. This Humphreys never did. The evidence shows that shortly

## Hamilton County Appeals.

thereafter he absconded, having failed to account to Mr. Evans for either the \$300 or the \$400 which were paid by Mr. Vaughan upon the principal. The evidence shows, however, that all the installments of interest, with the exception of the \$3 paid on November 10, 1910, were remitted to Mr. Evans by Mr. Humphreys, and that after the payment of the \$300 above referred to he continued to send remittances for interest the same as if said \$300 had not been paid, when in fact he was receiving, after such payment, interest upon only \$400 semi-annually. In other words, instead of paying the sum of \$12 as interest to Mr. Evans after September 21, 1909, which sum was the amount actually received by him, he sent to Mr. Evans the sum of \$21 as each installment of interest became due and payable, obviously for the purpose of concealing from Mr. Evans the fact that he had ever received the payment upon the principal.

The action below was one for a personal judgment, and was tried by a jury. The question presented by the pleadings and the evidence was, which of two innocent persons should suffer by reason of the defalcation or embezzlement of this money by Humphreys.

The court charged the jury properly, as we think, in a special charge, as follows:

"If you find that both this plaintiff and defendant are innocent of any intentional wrong, but that the loss in question in this case must fall upon one of them, then I charge you that the one of them whose carelessness was responsible for the loss, must suffer the loss, if you find there was such carelessness."

The jury having found in favor of the defendants, it is but reasonable to conclude that under the charge of the court to the jury they found that the plaintiff had been guilty of carelessness, which carelessness had induced the defendant Vaughan to make the payments to Humphreys upon the note. Unless this finding is clearly against the manifest weight of the evidence and in the absence of any error in the charge of the court or in the admission or the rejection of material evidence, it fol-

**Evans v. Vaughan.**

lows that the verdict of the jury can not be questioned. The issue presented by the pleadings and submitted to the jury was one of fact to be determined solely by the jury on the evidence in the case.

We have read the record in the case very carefully in order to satisfy ourselves as to the evidence and the weight thereof as touching the respective claims of the parties. We can not say, after this examination, that the verdict of the jury is wrong.

It is contended by counsel for plaintiff in error that the question as to the position occupied by Humphreys in this transaction, viz., whether in receiving the sums paid upon the principal of the note he acted as the agent of Evans or as the agent of Vaughan, was one of law and should have been determined by the court. With this contention we can not agree. The action being primarily one for a money judgment is triable to a jury. The jury was entitled to hear all the evidence material to the issue, and all that would in any way enable them to decide whether or not the defendant had paid the note as claimed in his defense. It became a question, therefore, whether Mr. Vaughan had merely taken his money to Mr. Humphrey's office and left it there in the custody of Mr. Humphreys with the request, express or implied, that it should be applied in payment of the Evans note, or whether he had paid it to Mr. Humphreys, warranted in believing from all the circumstances that he represented Mr. Evans as agent in the transaction and as such was authorized by Evans to receive the principal and interest.

The facts in the case in addition to those above stated are that although this note ran more than three years after it became due, the payee and holder thereof made no demand upon Mr. Vaughan at any time for the payment of the note and, so far as the evidence discloses, gave the matter no attention whatever. Mr. Vaughan and Mr. Evans had never seen each other before the trial of this case in the court below. The note stated on its face that it was to be paid "at the office of J. E. Humphreys, Cincinnati, Ohio." Vaughan was ignorant and unac-

## Hamilton County Appeals.

customed to business affairs. The law is well settled that to make a note payable at a bank does not authorize the maker to pay the note at such bank and discharge him therefrom upon doing so, unless the bank at the time of payment has the note in its possession. Nearly all blank forms of promissory notes are printed so as to be made payable at some bank or financial institution, and little attention is usually given by parties to a transaction to the provisions of the note in this respect.

It seems to us to make a somewhat different situation where as in this case the words are inserted in the note making it payable at the private office of an attorney at law. This alone might not be important, but when it is borne in mind that the evidence in this case shows that Mr. Vaughan had never seen Mr. Evans; that Mr. Humphreys through an agent, Mr. Morton, was the one to whom he had applied for the loan; that the money was paid over to him by Mr. Humphreys; that he handed his note and mortgage to Mr. Humphreys who filed the latter for record; that he paid the interest for five years to Humphreys with the knowledge and without any protest from Evans; and, although the note was over three years past due when it was paid, which fact usually brings some protest or notice from the payee that he never received any notice, all these circumstances combine to induce a man such as Vaughan to look upon Humphreys as the agent of Evans for all purposes of the transaction.

Cases have been cited by both sides, and counsel for plaintiff in error rely upon the case of *Antioch College v. Carroll*, 11 Dec. Re. 220 (25 Bull. 289), decided by Judge Taft. That case was tried to the court without the intervention of a jury, it being an equitable proceeding. It is needless to say that none of the cases presented by either side present the same state of facts as we find here. Such being the case, we should not be justified in discrediting the verdict of the jury in the case at bar, for the reason that it does not coincide with the views expressed in another case, where the facts are not identical, however able and distinguished might be the jurist who announced the opinion.

**Evans v. Vaughan.**

Some alleged errors are pointed out in the brief for plaintiff in error in the admission and rejection of evidence. One of these objections touches a vital spot in this case, and for that reason we shall refer to it briefly here. On page 48 of the bill of exceptions plaintiff was asked this question:

"Q. I will ask you whether you at any time authorized Mr. Humphreys to collect the principal of the note made by James P. Vaughan to your order in controversy in this case?"

An objection to this question was sustained and the ruling was excepted to. The court very properly stated, in passing upon this objection, that it was "what was said and done" that should be inquired into. The question, in the form in which it was presented, asked the witness to give his conclusions.

In order to bind Mr. Evans in this case by the payment to Humphreys it was not necessary that any express authority be shown as having been given by him to Humphreys, but authority might be implied from the acts of the parties. Such being the case, the court properly refused to allow the question to be answered.

This ruling upon the evidence involves in its legal aspect the question raised by an objection to the general charge of the court. The court charged the jury, in part, as found on page 57, as follows:

"Now an agent may be one who has authority to collect money, actual authority to collect or ostensible authority to collect it. Now ostensible authority to collect money is shown by the intentional acts between two parties, or by the want of ordinary care, causing the loss to a third person, and that would be Mr. Vaughan in this case, to believe Mr. Humphreys had a right to collect this money on this note and mortgage. If you find from a preponderance of the evidence, Mr. Evans either actually or ostensibly permitted Mr. Humphreys to act as his agent in collecting this money, that he did this intentionally or by want of ordinary care, or by his own negligence led Mr. Vaughan to believe and have reason to believe that Mr. Humphreys was his agent to collect the money, then Mr. Evans can not recover and your verdict will be for defendant."

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The law is correctly, though somewhat imperfectly, stated in this portion of the charge. It is manifest, therefore, that the court below having in mind the principle here enunciated refused to permit Mr. Evans to answer the question above quoted as to whether he had ever authorized Mr. Humphreys to collect the principal sum of the note.

We think there was no error to the prejudice of the plaintiff in error here in any of the matters complained of in counsel's brief.

The jury, under proper instructions from the court found that Mr. Vaughan in paying the money to Humphreys regarded Mr. Humphreys as the agent of the payee and as fully authorized to receive the money.

We think it was only natural for a man of Vaughan's inexperience to be induced so as to believe and so to look upon Mr. Humphreys, from all the facts and circumstances in this case, and from the conduct of Mr. Evans himself. His silence for five years, and especially for the last three years when the note was overdue, would naturally tend to make Vaughan believe that the entire matter was in the hands of Mr. Humphreys with whom alone he had transacted the business so far.

We do not say that Vaughan was free from any carelessness and negligence. It was his duty as a careful man to have held the payment of the principal of the note until credit was given thereon in his presence or until when final payment was made the note was surrendered to him, but it seems that the implicit confidence which Mr. Evans placed in Mr. Humphreys, who was a stranger to Vaughan, inspired a feeling of security and confidence in the latter.

The jury must have found, as before stated, that of the two innocent parties the negligence of Evans more directly contributed to the loss, and that therefore under the well settled doctrine of law he must be made to suffer.

Judgment affirmed.

Jones, O. B., J., concurs.

Swing, J., dissenting.

**Evans v. Vaughan.**

There is no evidence in the case that shows that Evans ever constituted Humphreys his agent to receive payment of this note, and there is no evidence that tends to show that Evans in any way represented to Vaughan that he was so authorized, and the judgment therefore is not sustained by the evidence.

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**COURTS—DIVORCE AND ALIMONY.**

[Sandusky (6th) Court of Appeals, October 15, 1915.]

Richards, Chittenden and Kinkade, JJ.

**CLEVELAND PROT. ORPHAN ASYLUM ET AL. V. HAZEL TAYLOR SOULE.**

**1. Juvenile Court Statute does not Supersede Divorce Statutes as to Disposition of Dependent Children.**

Sections 1647, 1648 and 8081 G. C., conferring on juvenile courts authority to determine cases involving delinquent, neglected and dependent children, does not supersede Sec. 11987 G. C. empowering common pleas courts to make orders for the disposition, care and maintenance of children of parents involved in divorce proceedings.

**2. Common Pleas has Continuing Jurisdiction in Divorce as to Custody of Children to the Exclusion of the Juvenile Court.**

A court of common pleas, having made an order concerning the disposition of a minor child of parents involved in divorce proceedings, has continuing jurisdiction of such child, precluding a juvenile court from taking independent jurisdiction thereof, if the best interests of the child demand a change of custody the proper procedure is by application to the common pleas court to modify its former order.

**3. Court Having First Jurisdiction Retains It.**

The principle, that the court first obtaining jurisdiction of a subject-matter retains exclusive jurisdiction and authority until final disposition, applies to jurisdiction of a dependent child, concerning which a common pleas court has made an order for the custody in divorce proceedings, and a juvenile court has no authority to make an order for the disposition of such child.

## Sandusky County Appeals.

## ERROR.

*W. J. Mead*, for plaintiffs in error.

*Kinney, O'Farrell & Rimelspach* and *E. C. Sayles*, for defendant in error.

## RICHARDS, J.

This is a proceeding in habeas corpus brought in the court of common pleas to recover the custody of a child about eleven years of age. The court of common pleas granted the writ and error is prosecuted to that judgment. The case raises a very interesting question of jurisdiction as between the probate court and the common pleas court. No disputed matters of fact arise in the case. The important facts to be considered in determining the questions raised are simply, that in a divorce action pending between the father and mother of the child, the custody of the child had been awarded to the mother in the court of common pleas of this county on December 26, 1913. In pursuance of this decree of the common pleas court, the mother took and retained possession of the child. In May, 1914, proceedings were instituted in the probate court, acting as a juvenile court in this county, in which it was charged that the child was a dependent child by reason of the fact that it had not proper parental care and that its home was, by reason of neglect and depravity on the part of its parents, an unfit place for the child. On the trial in the juvenile court that court found and adjudged that the child was a dependent of about the age of eleven years, and that she was a ward of the court, and the court ordered that her custody be committed to the Cleveland Protestant Orphan Asylum, to be there cared for and educated until the further order of the court.

The authority vested by statute in the court of common pleas in an action for divorce is contained in Sec. 11987 G. C., and empowers that court to make such order for the disposition, care and maintenance of the child, as is just. The order which was made in the court of common pleas antedates the order in the juvenile court and was made in direct conformity with the language of the statute. It is said, however, that the



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juvenile court law supersedes the order and decree made in the court of common pleas. The juvenile court proceeded under and by virtue of the authority contained in Secs. 1647, 1648 and 8031 G. C. These sections confer ample authority upon the juvenile court to consider and determine cases involving questions of delinquent, neglected or dependent children. The latter Sec. 8031 G. C., provides, in substance, that, when a parent, through vagrancy, negligence or misconduct, is unable to support a minor child or neglects so to do, or habitually ill-treats such child, the probate court may issue a summons requiring the parent to appear and answer the complaint and if the court finds the complaint to be true and that it is for the best interests of the child to be taken from the parent, it may make an order to that effect and direct the placing of the child in a suitable orphan asylum or children's home or with some other benevolent society. We do not, however, understand that these sections operate to supersede the authority conferred on courts of common pleas to make proper orders for the disposition, care and maintenance of the children of parents involved in a divorce action before that court. It has long been held that the jurisdiction of the court of common pleas over the children of parents so involved is a continuing jurisdiction, and that the child becomes the ward of the court. This child was a ward of the court of common pleas prior to and at the time the proceedings were brought in the juvenile court. We think that the statutes conferring authority on any court in such matters must be read as limited to children not already provided for by some other court having first obtained jurisdiction. *Hoffman v. Hoffman*, 15 Ohio St. 427; *Rogers v. Rogers*, 51 Ohio St. 1 [36 N. E. Rep. 310].

A similar question has been before the Supreme Court on two recent occasions, the first being *Crist, In re*, 89 Ohio St. 33. In that case the probate court had appointed a guardian of the child after the decree awarding the custody of the child had been entered in the court of common pleas, and it was held that the child had become the ward of the court of common pleas and that the jurisdiction over its custody was a continu-

## Sandusky County Appeals.

ing jurisdiction and could not be affected by the subsequent appointment of a guardian in the probate court.

The question was again before the Supreme Court in the *Children's Home of Marion Co. v. Fetter*, 90 Ohio St. 110. In that case a delinquent child had become a ward of the juvenile court and had been committed to an institution under provisions of the General Code relating to that court. Thereafter proceedings in habeas corpus were brought by a parent of the child and it was held that the order of the juvenile court was effective and controlling and that the court assuming to take subsequent jurisdiction was without authority. This is but another enunciation of a principle of law that has been recognized from time immemorial, that the court first obtaining jurisdiction of the subject-matter retains exclusive jurisdiction and authority until final disposition, free from interference by any other tribunal. Of course, this principle has nothing to do with the question of convictions of minors for violations of any criminal statute. To hold differently than in accordance with the rule above stated would permit a defeated litigant, seeking the custody of a minor child in the common pleas court, to go immediately to the juvenile court and there relitigate the question just determined in the common pleas court. It would be doing violence to all known rules of procedure to assume that the general assembly intended by the passage of the juvenile law to confer authority on the juvenile court to relitigate matters already determined in another court, particularly in view of the fact that the orders as to the custody of children are continuing orders.

We see no reason why the order in the court of common pleas granting the custody of the child to the mother could not be modified in that court if conditions had so changed as to render such modification proper.

We call attention of counsel to the language of the Supreme Court in the closing paragraph of the opinion in *Bower v. Bower*, 90 Ohio St. 172. In that case the Supreme Court sustained the appealability of an order of the common pleas court determining the care, custody and maintenance of minor

**Orphan Asylum v. Soule.**

children, and in so doing affirmed the judgment of the circuit court and remanded the case to that court for such further orders from time to time, touching the custody and support of the children, as that court should deem just and proper.

We are entirely in accord with the eloquent tribute to the home as a place for rearing children, announced by Mr. Justice Brewer, found in *Bullen, In re*, 28 Kan. 557. The only question however, that is in this court is one as to the jurisdiction of the juvenile court under the circumstances disclosed in the record. The court of common pleas found that the order made in that court in the divorce case was unreversed and not modified and still in force, and that for this reason the juvenile court had no jurisdiction over the child as a dependent child. With that judgment we are in accord and the same will, therefore, be affirmed.

**Chittenden, J., concurs.**

**Kinkade, J.**

I concur in the judgment of affirmance but I think it might well be placed on an additional ground than that mentioned in the opinion of Judge Richards, to wit, that it is manifest in the record that the child in question is no longer a dependent child, if she was such at the time of the entry of the judgment of the juvenile court.

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## ACTIONS—INSURANCE.

[Cuyahoga (8th) Circuit Court, May 20, 1907.]

Marvin, Winch and Henry, JJ.

LENA STRAUCH V. SIMON STRAUCH ET AL.

**Action for Cancellation of a Substituted Benefit Certificate Prematurely Brought before Death of Insured.**

Where a husband and wife, who had entered into an antenuptial contract in which he assigned all his property to her, later separated and he took out a second certificate in a mutual benefit association, which, by the by-laws of the association changed the beneficiary, in an action by the wife who was the first beneficiary against the husband, the association and the new beneficiary to compel the cancellation of the new certificate and the recognition of the plaintiff as beneficiary, is prematurely brought.

*J. C. Block and Daniel B. Stone, for plaintiff.*

*C. W. Fuller and Laubscher & Kees, for defendants.*

**HENRY, J.**

The defendant, Simon Strauch, is the husband of the plaintiff, and father of the defendant, Carrie Strauch, and a member and certificate holder in the Supreme Council of the Royal Arcanum.

Simon Strauch and his wife were married August 20, 1893; prior to that time they entered into an antenuptial contract in writing, whereby he assigned all of his property to her. His business and health failing, he became unable to support his wife, and they have lived apart since April, 1900; he now lives with one of his daughters by a former marriage, Carrie Strauch.

The antenuptial contract makes no specific mention of his death benefit certificate in the Royal Arcanum, but that certificate and a policy of insurance in another company were made payable to Mrs. Strauch in September, 1897. Upon their separation the wife kept the custody of their two children, and by agreement with her husband, kept up the assessments on

## Strauch v. Strauch.

said certificate, payable, as aforesaid, to her. Some time afterwards, while living with his daughter by the first marriage, Simon Strauch wrote his wife, requesting her to send him said certificate. This request she did not comply with; whereupon, pursuant to the regulations of the Royal Arcanum in such case provided, he caused a new certificate to be issued to him in place of the former one, with his daughter Carrie as the designated beneficiary. Prior to that time the wife had paid the assessments; since then, the daughter has paid them. They have increased from about \$4 a month during the prior period to about \$16 per month at the present time.

Mrs. Strauch now brings her action for a cancellation of the substituted certificate and for the recognition of herself as the true beneficiary.

The regulations of the order permit members to change beneficiaries at pleasure, negative the existence of any vested right in a beneficiary, and provide that assignments of death benefit certificates shall be void. The Royal Arcanum is incorporated under the laws of Massachusetts, whose statutes and decisions have recognized and enforced these provisions. The Royal Arcanum is here resisting the granting of the relief prayed for by plaintiff. It insists that the alleged agreement between Mr. and Mrs. Strauch is void and creates no vested right in the latter.

In *Tisch v. Home Circle*, 72 Ohio St. 233 [74 N. E. Rep. 188], Davis, C. J., delivering the opinion of the court says at page 260:

"But prior to the death of the insured what enforceable rights can accrue to the beneficiary? That is the question which is presented in this case. The insured may acquire rights in his or her lifetime which may be protected by law, but before the death of the insured the contract is, in general, executory as to the rights of the beneficiary. It may be rescinded by the parties or it may be defeated by failure of the insured to perform."

Without assuming to say that Simon Strauch and his wife might not enter into a contract valid as between themselves,

## Cuyahoga County Circuit.

whereby he divests himself of the right to change the beneficiary in his certificate, we think this action is prematurely brought. The wife and daughter are contesting about a mere expectancy. There is no fund in existence, for the death benefit, if and when it shall become payable, will be derived from assessments upon the members of the order who shall then be in good standing. It is as if two purchasers of a future catch of fish should litigate the question of their respective rights therein before the fish are caught.

The plaintiff's petition is therefore dismissed without prejudice to a future action after the death of Simon Strauch.

Marvin and Winch, JJ., concur.

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WILLS.

[Licking (5th) Court of Appeals, 1913.]

Powell and Shields, JJ.

(Judge Voorhees not sitting.)

LAURA ROBRAHAM ET AL. V. ALLEN B. GREGG ET AL.

Limitation Upon a Devise Held Void.

Where land is devised generally by G. to H., without qualification or condition except the proviso that, in the event H. does not sell said land during his lifetime or make disposition thereof in his last will, the said land shall go to and become the property of persons named, the devise over is void, and in an action to set aside the will of H., it is not error to sustain an objection to testimony of the said secondary devisees on the ground that they are not persons having an interest in the will of H.

[Syllabus by the court.]

ERROR.

*Carl Norpell and Kile & Kirkpatrick*, for plaintiffs in error.

*Fitzgibbon & Montgomery*, for defendants in error.

POWELL, J.

The plaintiffs in error, Laura Robraham, Sloan Campbell, Margery Johnston, Erma Crawford, Margaret A. Hill and Lois

## Robraham v. Gregg.

B. Ingalls file a petition in error in this court, by which they seek to reverse the judgment of the court of common pleas, in an action brought in that court to set aside the will of one Ensley Finney Haas, deceased.

These plaintiffs in error were, by leave of the court, made parties defendant to a proceeding brought by the heirs at law of the said Ensley Finney Haas, deceased, to set aside what purported to be his last will and testament, which had been admitted to probate and record in the probate court of Licking county before that time.

By the will of Martha Goff, who was a sister of the said decedent, Ensley Finney Haas, he became the owner of the east half of a tract of land consisting of 135 acres, more or less, in Licking county, and which was described in the will of said Martha Goff, deceased. The plaintiffs in error claim to be the owners of this tract of land, which was devised by the said Martha Goff to Ensley Finney Haas, by virtue of the provisions of her will, in the event that the said Ensley Finney Haas did not sell, or otherwise dispose of said real estate during his lifetime, or by his last will and testament.

By item 2 of the will of said Martha Goff, an estate in fee simple was devised to the said Ensley Finney Haas. It was further provided in said item 2 of said will "that in the event that said Ensley Finney Haas does not sell or otherwise dispose of said east half during his life, or by his last will and testament, said east half of said property"—the said 135 acres—"shall go to and be the property absolutely of Margaret A. Hill, Margery Johnston, Eliza Dunlap, Addie Dunlap, Lois B. Ingalls, Laura Robraham, Sloan Campbell, Erma Crawford and Harriett Hughes; that is, that said property shall be owned by said named persons, or those of the same who are living at the time of my said brother's death."

The plaintiffs in error claim that, because of incapacity and undue influence, the paper-writing, which was admitted to probate and record as the last will and testament of the said Ensley Finney Haas, was not his will; and on the trial of said cause in the court of common pleas they endeavored to show,

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by testimony, that the same was not his will; that he was without capacity to make a will at the time when said purported will was executed, and that, by reason of undue influence on the part of the defendants, such paper-writing was not his will; that they being named as secondary devisees of said real estate in the will of Martha Goff in the event that said Haas did not dispose of the same, they became the owners of said real estate upon his death; and they seek a decree of the court setting aside said will.

Their right to offer testimony on the trial of said cause was objected to on the part of the various devisees named in the will of said Ensley Finney Haas, on the ground that these secondary devisees, now plaintiffs in error, had no interest in the estate of the said Ensley Finney Haas, deceased, and that the devise over, in the second item of the will of Martha Goff, was void; that they were strangers to his estate, and without authority to contest the validity of his will.

Their right to maintain said action depends upon the construction to be given to the second item of the will of said Martha Goff. There is no dispute among counsel or claim that the second item of the will of Martha Goff does not give an absolute estate in fee simple to the land described in said item to said Ensley Finney Haas; and it is not claimed but that, by the terms of said will, he had full power of disposition and could sell and convey, or could devise by last will and testament, the land so devised to him; and only in the event that he failed to exercise his power to convey the deed or by will, could the plaintiff in error become seized of any interest in said lands.

A large number of authorities have been cited as to the proper construction to be given to this item of the will of Martha Goff. If plaintiffs have any interest whatever under said will, they were entitled, by reason of such interest, to contest the validity of the will of said Ensley Finney Haas and to have the same set aside in case a proper showing for that purpose had been made. If they do not take any interest under the will of Martha Goff, then the action of the court below, in refusing to hear testimony offered by them, was correct.



## Robraham v. Gregg.

Upon an examination of all of the authorities cited by counsel for both plaintiffs in error and defendants in error, the court has arrived at the conclusion that the plaintiffs in error have no interest in said lands derived through the will of the said Martha Goff, deceased; that the title to said lands passed by said will absolutely and in fee simple to the said Ensley Finney Haas and that the devise over, in the event that he died without having disposed of said real estate by deed or will, is void.

It is said to be a general rule that, when an estate is given to a person generally, with a power of disposition, it carries with it the fee; and the only exception to the rule is when the testator gives to the first taker an estate for life only by certain and express words, and annexes to it a power of disposition. There can be no question but that the estate conveyed by the second item of the will of Martha Goff to the said Ensley Finney Haas was an absolute estate in fee simple, with full power of disposition; and that the limitation over, in case he did not dispose of it by will or otherwise in his lifetime, is void. *Finlay Brewing Co. v. Dick*, 13 Dec. 581 (1 N. S. 592), the syllabus of which case is: "If real estate is devised to A generally, without any qualification or condition, but with a proviso that in case of his death without will, the property shall go to B, the limitation over is void, and A takes the entire estate in fee simple, unaffected by the proviso." This case was affirmed by the circuit court of Lucas county, without report.

We think this rule of law is controlling in the case at bar; that the provision in the will of the said Martha Goff, deceased, under which the plaintiffs in error claim title, is void and of no effect; and that because said plaintiffs in error have no interest or title in and to the estate of the said Ensley Finney Haas, except under this void provision, they are without right or authority to contest his will. The persons who are authorized by statute to maintain a contest of the will of any deceased person are named and specified in Sec. 12079 G. C. The Supreme Court, in construing Secs. 5858 and 5859 R. S. say:

## Licking County Appeals.

"Any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested,' " and only "a person interested" can maintain a suit to set aside a will. *Bloor v. Platt*, 78 Ohio St. 46 [84 N. E. Rep. 604; 14 Ann. Cas. 332].

It follows that the judgment of the court of common pleas, in refusing to permit plaintiffs in error to introduce testimony because of their want of interest in the estate of the said decedent, was correct, and that the judgment of said court should be affirmed.

Shields, J., concurs.

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CRIMINAL LAW—HOMICIDE.

[Stark (5th) Circuit Court, February Term, 1913.]

Voorhees, Powell and Shields, JJ.

JOSEPH ANDY V. STATE OF OHIO.

1. Near Relative of State Witness May Act as Interpreter in Trial for Homicide.

It is not error in a trial for homicide to permit a near relative of one of the witnesses for the state to act as interpreter, where there is nothing tending to show that the said interpreter was in any way biased or prejudiced or interested in the outcome of the trial.

2. Mutilated Heart of Person Killed Exhibited in Homicide Trial to Show Character of Incision.

Nor is it error in such a case to exhibit to the jury the mutilated heart of the decedent for the purpose of showing the character of the incision which had been made therein as bearing upon the cause of death.

3. Instruction Concerning Aider and Abettor not Prejudicial by Adding "and to Some Degree Contributed thereto" though Surplusage.

The addition by the court to a special instruction to the jury asked by the defendant of the words, "and to some degree contributed thereto," was not prejudicial but mere surplusage, since the conclusion that he was an aider or abettor could not be reached by the jury unless there was evidence tending to show that he did something in furtherance of the common purpose to take the life of the decedent.

*Andy v. State.***4. "Guilty of Crime Charged" Sufficient Verdict in Second Degree Murder.**

A verdict, "Guilty of the crime charged," in a prosecution for second degree murder, is properly received.

[Syllabus by the court.]

**ERROR.**

*Russell J. Burt*, for plaintiff in error.

*H. C. Pontius* and *Frank N. Sweitzer*, for defendant in error.

**SHIELDS, J.**

The plaintiff in error, Joseph Andy, was indicted by the grand jury of Stark county, Ohio, at the September term, 1912, for murder in the second degree. Afterwards the accused was placed upon trial, and was found guilty as charged in said indictment. A motion for a new trial was filed, which was overruled, and the accused was sentenced according to law. A bill of exceptions was taken, embodying the evidence taken upon the trial, including the charge of the court, and said case was brought into this court for review upon a petition in error filed for that purpose.

Numerous grounds of error are alleged in said petition in error for the reversal of the judgment of the court of common pleas, but the errors relied upon by plaintiff in error and argued to this court are:

1. That the verdict of the jury is clearly against the weight of the evidence.
2. That the court below erred in permitting one Mary Pew, a sister of one of the state's witnesses, to act as interpreter throughout the trial below.
3. That said court below erred in allowing the introduction in evidence of the heart of decedent.
4. That said court erred in its charge to the jury.
5. That said court erred in its charge to the jury upon the subject of aiders and abettors.
6. That said court erred in receiving the verdict as returned by the jury.

First. It is contended that the verdict of the jury was

## Stark County Circuit.

clearly against the weight of the evidence. On account of the importance of the case to the plaintiff in error, as well as to the state, we have reviewed the evidence in the entire record with no little care, and with special reference to the contention of counsel for plaintiff in error on this ground; and as a reviewing court, keeping in mind the rule that the verdict of a jury should not be set aside unless it is manifestly against the weight of the evidence, we are of the opinion that the record presents a case which does not require this court to interfere with the verdict of the jury on the ground stated.

Second. It is contended by the plaintiff in error that there was an abuse of discretion upon the part of the court below in permitting one Mary Pew to act as interpreter at the trial of the plaintiff in error, because said interpreter was a relative of certain witnesses who testified upon the trial for the state. The record fails to show that said interpreter was biased or prejudiced, or in any way interested in the outcome of said trial; and exercising a sound discretion possessed by the court presiding at said trial, in the absence of any showing that said interpreter was disqualified to act as such, we think there was no error upon the part of the court in this respect.

Third. It is argued by the plaintiff in error that the court below erred in allowing the state to make proof of the heart of the decedent before the jury. The burden of proving the cause of death being upon the state, it was certainly the privilege of the state, in our judgment, to make such proof by the production of this mutilated organ, as tending to show the character and extent of the incision made therein, and we think that the action of the court in this respect was not erroneous.

Fourth. It is claimed by plaintiff in error that the court below erred in its charge to the jury, and especially upon the subject of aiding and abetting in the commission of the crime charged in the indictment. A written request was submitted by the plaintiff in error, before argument, upon this subject with the request that the same be given by the court to the jury; and it appears that it was so given. But it is claimed that said court, in its general charge, when instructing the jury upon this

## Andy v. State.

subject, went beyond the rule of law embodied in said written request, and beyond the rule of law laid down by our Supreme Court upon this subject. An analysis of the instruction given leads us to disagree with the contention thus made; but granting that the words "and to some degree contributed thereto" were added, could, or did, such addition work any prejudice to plaintiff in error? We think not, for if the evidence showed that he was not a principal, but an aider and abettor in the commission of this homicide, such a conclusion could not have been reached by the jury, under the charge given, unless it appeared in evidence that he said or did something in furtherance of a common purpose to take the life of the decedent, and if such fact did so appear, it would contribute to the execution of such felonious purpose. We are of the opinion that this follows from the very definition of terms "aiders" and "abettors," and that such additional instruction is mere surplusage at most.

Entertaining these views, the exception taken in this respect is held to be untenable, and affords no ground of prejudicial or reversible error.

Fifth. It is also contended that the court below erred in receiving the verdict as returned by the jury, because said verdict does not specify the degree of the crime of homicide of which plaintiff in error was found guilty. This is not a case wherein the verdict of the jury was for any degree or crime other than that charged. He was indicted for second degree murder, and was found guilty of said crime; or, in the language of the verdict returned, "guilty as he stands charged in the indictment." The court below properly instructed the jury that the crime charged included also the lesser crime of manslaughter, assault and battery, and assault, for either of which a verdict of guilty might be returned by the jury, and not guilty of the crime of murder in the second degree as charged in the indictment. But the verdict was: Guilty of the crime charged. In a case where a defendant is charged with first degree homicide, and the jury should find him guilty of second degree, or manslaughter, under the statute as it was prior to the enactment of Sec. 13692 G. C., then the contention of plain-

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tiff in error might merit consideration, but not under the present statute; nor under the facts in this case where, under the charge of the court, the jury were instructed that they might return a verdict of guilty of either of the offenses hereinbefore mentioned, on one of the several forms of verdict sent to the jury room, or a verdict of not guilty. For the foregoing reasons, we hold that this exception is not well taken.

We have also examined said record in reference to the other assignments of error set out in the petition in error, and we find no such error therein as to call for a reversal of the judgment of the court below.

The judgment of the court of common pleas will, therefore, be affirmed, and said cause is remanded to said court for execution. Exceptions.

Voorhees and Powell, JJ., concur.

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SPECIFIC PERFORMANCE.

[Williams (6th) Circuit Court, October 31, 1911.]

Wildman, Kinkade and Richards, JJ.

RHINOLD BANKEY V. J. E. MANON.

**Specific Performance Refused Where Enforcement Would be Harsh and Inequitable.**

A decree for specific performance will not be granted, where to compel performance would be extremely harsh, oppressive and inequitable by reason of the fact that the option of purchase was not exercised by the lessee until the lessor, at the request of the lessee, had put in improvements which doubled both the market and rental value of the property, and double rental was paid by the lessee until about the time of the termination of the lease when an attempt was made to exercise the option of purchase.

[Syllabus by the court.]

## APPEAL.

*John H. Schrider and Newcomer & Gebhard*, for plaintiff.

Cited and commented on by the following authorities:  
*Crawford v. Kastner*, 26 Hun. 440; 63 How. Pr. (N. Y.) 90;

**Bankey v. Manon.**

*Rothschild v. Williamson*, 83 Ind. 387; *Harding v. Seeley*, 148 Pa. St. 20 [23 Atl. Rep. 1118]; *Gilbert v. Port*, 28 Ohio St. 276; 36 Cyc. 625; *De Rutte v. Muldrow*, 16 Cal. 505; *Wilkins v. Evans*, 1 Md. Ch. 156; *Bras v. Sheffield*, 49 Kan. 702 [31 Pac. Rep. 306; 33 Am. St. Rep. 386]; *Schroeder v. Gemeinder*, 10 Nev. 355; *Elston v. Schilling*, 42 N. Y. 79; *Smith v. Gibson*, 25 Neb. 511 [41 N. W. Rep. 360]; *Hartman v. McAlister*, 5 N. C. 207; 24 Cyc. 1021, 1023; *Wiedemann Brew. Co. v. Maxwell*, 78 Ohio St. 55, 63 [84 N. E. Rep. 595]; *Bacon v. Daniels*, 37 Ohio St. 279; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161 [44 N. E. Rep. 1093; 34 L. R. A. 62]; *Brown v. Fowler*, 65 Ohio St. 507 [63 N. E. Rep. 76]; *Monihon v. Wakelin*, 6 Ariz. 225 [56 Pac. Rep. 735].

*Bowersox & Peck*, for defendant.

**RICHARDS, J.**

This case is pending in this court on appeal from the common pleas court. It is an action to enforce the specific performance of a contract containing an option to purchase certain real estate, situated in Williams Center, this county. It appears from the evidence that the property was leased by J. E. Manon to certain lessees, and that the lessees assigned to the plaintiff, Rhinold Bankey. This lease was executed on November 1, 1905, and was for one year with the privilege of five, and it contains a clause giving the right of purchase for the sum of \$700 at any time while the contract was in force. The rental reserved in the lease is five dollars per month. Some time after the execution of the lease and after possession was taken under it, the parties agreed to a modification, at least to the extent that the owner was to erect an addition to the building on the premises and that the rent should be increased to \$11 per month. The improvements were made by the owner, and are conceded by the plaintiff in his reply to be of the value of at least \$300. We find from the evidence that the value of these improvements, so made by the defendant, is at least the sum of \$700. The increased rental was paid by the plaintiff until the expiration of the lease, or substantially to that date. The plaintiff has elected to exercise the option contained in the lease, and asks from this court

## Williams County Circuit.

that the defendant be required to specifically perform by conveying the premises to him upon payment of the sum of \$700. We think it entirely clear from the evidence that these improvements were made by the defendant, and the value of the premises enhanced accordingly, under circumstances which show that the defendant did not understand that he was still bound, after the change in the rental price and the completion of the improvements, to convey the premises to the plaintiff for the price named in the option. He had good reason to believe and apparently did believe that the substantial improvements made which at least doubled the value of the property, coupled with the change of the rent from \$5 per month to \$11 per month released him from the option in the lease. Under the circumstances existing in this case the plaintiff must not expect a court of equity to compel the transfer to him of property worth at least \$1,400 upon the payment by him of \$700. The agreed rental value of \$11 per month is equal to \$132 per year, which would amount to an income of 8 per cent on a valuation of \$1,650. The later rent paid amounts to nearly 20 per cent. on the sum of \$700, which is the amount offered by the plaintiff, in return for which he demands the conveyance of these premises. It is clearly a demand that a court of equity should do that which is inequitable. We call attention to the following cases: *Tiffin v. Shawhan*, 43 Ohio St. 178 [1 N. E. Rep. 581]; *Hughes v. Roth*, 7 Circ. Dec. 441 (18 R. 804).

To compel the specific performance of the agreement contained in the lease would be extremely harsh, oppressive and inequitable. The defendant in this case filed a motion for judgment upon the pleadings in his favor, and we think he is not entitled to have the same granted. Upon the merits of the case, however, we find for the defendant, and refuse specific performance.

**Wildman and Kinkade, JJ., concur.**



Oldham, *Ex parte*.

### COURT—PROHIBITION.

[Montgomery (2nd) Court of Appeals, March 21, 1914.]

Allread, Ferneding and Kunkle, JJ.

EX PARTE DAVID OLDHAM.

Writ of Prohibition Denied Until Jurisdiction Denied in Court Challenged.

The writ of prohibition will not ordinarily be allowed until the question of jurisdiction has been made and overruled in the court or tribunal whose jurisdiction is challenged.

[Syllabus by the court.]

WRIT of Prohibition.

*Horace Andrews, H. H. McKeon and P. R. Taylor*, for petitioner.

*John A. McMahon, J. Warren Kiefer, O. B. Brown, John Galvin and E. A. Belden*, *amicus curiae*.

*C. C. Hall*, Pros. Atty., for Shelby County, *J. Guy O'Donnell*, Pros. Atty., for Miami County, *F. G. Long*, Pros. Atty., and *A. J. Metler*, for Logan County, *G. S. Thomas*, city solicitor, and *Robert A. Black*, for City of Troy.

ALLREAD, J.

David Oldham, a citizen and taxpayer of Shelby county, petitions for a writ of prohibition against the judges of the courts of common pleas, to restrain them from acting as a conservancy court, upon the ground that the conservancy act is unconstitutional and void.

The preliminary question is whether this court as a matter of right can, or, as a matter of discretion, should entertain the writ in advance of action upon the jurisdictional question by the tribunal whose jurisdiction is questioned.

The writ of prohibition is a remedy revived or brought into the jurisprudence of our state by constitutional amendment taking effect January 1, 1913. This remedy was not intended to become a substitute for, or supersede, the ordinary or usual procedure of courts of general or special jurisdiction.

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The writ must be confined to occasions and causes where the usual procedure is defective or inadequate and where it becomes necessary to subserve the ends of justice.

No better statement of the objects and purposes of the writ can be found than in *Walcott v. Wells*, 21 Nev. 50 [24 Pac. Rep. 367]:

"The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity. Before it should issue, it must appear that the petitioner has applied to the inferior tribunal for relief. The object of the writ is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such action. It does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal. It is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable."

Spelling, Extra Rel. Sec. 1731, says:

"The extraordinary remedy by prohibition is confined at present, as when first employed, only to cases where it appears that the party seeking has an actual grievance and has applied without avail to the inferior tribunal for relief."

The authors of Cyc. (32 Cyc. 624), thus summarize the American and English authorities:

"An application for a writ of prohibition will not be considered, unless a plea to the jurisdiction has been first filed and overruled in the lower court. Until the inferior court has been asked in some form, and without avail, to refrain from proceeding with the trial of a case, or to dismiss the same, a superior court will not entertain an application for a writ of prohibition."

Exceptions to the rule are noted in the text, but none ap-

Oldham, *Ex parte*.

ply to the present proceedings. Conflicting decisions are also noted.

Many of the cases cited by counsel for the petitioner acknowledge the general rule but originate and justify exceptions growing out of special circumstances. Some, notably the Arkansas and Colorado cases, are followed by subsequent cases in the same courts acknowledging the general rule.

*Little Rock, Ex parte*, 26 Ark. 52:

"Prohibition will not lie to an inferior court, in a cause arising out of its jurisdiction, until that matter has been pleaded in the original court and the plea refused.

"The circuit court will not be presumed to take cognizance of matters not within its jurisdiction."

*Adams County Court v. People*, 48 Colo. 539 [111 Pac. Rep. 86]:

"A petition to have a court prohibited on the ground of lack of jurisdiction from further proceeding in a criminal contempt proceeding is insufficient; it not showing that the jurisdiction of such court was challenged by appropriate plea or motion therein, so as to give it opportunity to pass on the question, as it is not to be assumed that, had the question been raised there, it would not have correctly ruled thereon."

*Chester v. Colby*, 52 Cal. 516:

"If the question of the jurisdiction of an inferior court in a case before it has been submitted to that court by an appropriate pleading or objection, a writ of prohibition will not issue to restrain such court from proceeding in the case while the question of its jurisdiction remains undetermined by such court."

*Oklahoma, Ex parte*, 220 U. S. 191, 208 [31 Sup. Ct. Rep. 426; 55 L. Ed. 431];

"It is firmly established that where it appears that a court whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right."

The argument is made that when the constitutional conven-

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tion of 1912 submitted and the people adopted this judicial amendment, it was intended thereby to revive the common law writ as interpreted and practiced in the English courts.

This court will take judicial notice that eminent lawyers of the state were members of the constitutional convention and took a leading part in framing this judicial amendment.

It is, in our opinion, a more probable inference that the eminent lawyers who framed this amendment and the citizens who adopted it contemplated the writ as known in this state by the practice in the federal court. This inference is strengthened by the close analogy existing between the judicial amendments in other respects to the federal practice.

The general rule above announced is especially applicable to the present proceedings. The enterprise at hand is one of great magnitude and importance. The conservancy act is of necessity comprehensive in its general scope and embraces many details.

The court specially charged with jurisdiction under the conservancy act consists in the present instance of ten judges of the court of common pleas, from the counties affected. These judges from the various courts are learned in the law, and experienced in constitutional interpretation. We think it would be an unjustifiable inference to be indulged in by this court that the conservancy court will not fully consider and correctly determine the constitutional as well as all other questions submitted. If the law should be wrongly interpreted by the conservancy court, there will still be ample opportunity for intervention in an appropriate court before the property of the petitioner can be affected.

For the reasons above stated, the writ of prohibition will be denied, and the petition therefor dismissed.

**Ferneding and Kunkle, JJ., concur.**

Jennings v. Shepherd.

### ARREST—MALICIOUS PROSECUTION.

[Pickaway (4th) Court of Appeals, May 28, 1914.]

Walters, Sayre and Jones, JJ.

FRANK S. JENNINGS v. CHARLES SHEPHERD.

**Discharge of Accused by Examining Magistrate Prima Facie Evidence of Want of Probable Cause.**

In a suit for malicious prosecution, proof that the defendant filed an affidavit, in a mayor's court, charging the plaintiff with forgery and that, in consequence, he was arrested and imprisoned, and that, on the preliminary hearing, after witnesses were sworn and examined he was discharged, is *prima facie* evidence of want of probable cause.

ERROR.

Plaintiff in error defendant in the court of common pleas, filed an affidavit, in the mayor's court of Circleville, charging Shepherd with forgery.

The defendant in error was arrested and imprisoned, and after a trial by the mayor, in which witnesses for the state and defendant were examined, he was discharged. He thereupon brought this action for malicious prosecution and recovered a judgment for \$400.

C. A. Leist and G. G. Adkins, for plaintiff in error.

George W. Morrison and Charles Gerhardt, for defendant in error.

SAYRE, J.

The trial court charged the jury as follows:

"The fact that the mayor discharged the plaintiff because he did not find him guilty of the charge on which he was arrested is *prima facie* evidence that said criminal prosecution and arrest was without probable cause, but it is not conclusive evidence thereof. By *prima facie* evidence it is meant such evidence as creates a presumption that these facts are established by it in the absence of any evidence to the contrary. In other words, it is a sufficient way to establish the disputed facts

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until they are rebutted or overcome by evidence to the contrary."

It is contended on behalf of plaintiff in error that proof of a discharge by an examining magistrate is not *prima facie* evidence of want of probable cause and that the question has been decided by the case of *John v. Bridgman*, 27 Ohio St. 22, 39. But it will be seen that the statement of Judge Whitman, who wrote the opinion in that case, is an *obiter dictum*, because when he used the language that "the mere fact of acquittal and discharge by the magistrate was not enough" to show want of probable cause, he was discussing the question as to whether the plaintiff in the suit for malicious prosecution could show that no evidence was offered, before the magistrate, by the complainant to establish the charge contained in the affidavit. The question as to whether such discharge is *prima facie* evidence of want of probable cause was not one of the assignments of error and did not arise in the case.

Section 13511 G. C. provides:

"When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of said accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty he shall order him to enter into a recognizance \* \* \* otherwise he shall discharge him." \* \* \*

By virtue of Sec. 4542 G. C. the mayor of Circleville had the jurisdiction conferred in Sec. 13511 on a charge of forgery.

Hence, the question inquired into, by the magistrate, and the one he had authority to determine, was the one as to probable cause, and a finding was made that there was no probable cause to believe that Shepherd was guilty of the crime of forgery.

Was this finding *prima facie* evidence of a want of probable cause in this case?

The decisions of courts of last resort on this question are not in harmony. The following is a partial list of those holding that the discharge, by the magistrate, on a preliminary hearing, is *prima facie* evidence of the want of probable cause:

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*Stubbs v. Mulholland*, 168 Mo. 47 [67 S. W. Rep. 650]; *Jones v. Finch*, 84 Va. 204 [4 S. E. Rep. 342]; *Brown v. Vittur*, 47 La. Ann. 607 [17 So. Rep. 193]; *Ross v. Hixon*, 46 Kan. 550 [26 Pac. Rep. 955; 26 Am. St. Rep. 123]; *Smith v. Clark*, 37 Utah 116 [106 Pac. Rep. 653]; *Frost v. Holland*, 75 Me. 108; *Munns v. Dupont*, 1 Am. Lead. Cas. 184; *Johnson v. Chambers*, 32 N. C. 287; *Vinal v. Core*, 18 W. Va. 42; *Eggett v. Allen*, 119 Wis. 625 [96 N. W. Rep. 803]; *Barhight v. Tammany*, 158 Pa. St. 545 [28 Atl. Rep. 135; 38 Am. St. Rep. 853].

The case of *Davis v. McMillan*, 142 Mich. 391 [105 N. W. Rep. 862; 3 L. R. A. (N. S.) 928; 113 Am. St. Rep. 585], reviews a number of decisions on the subject and especially those holding that the discharge by the magistrate is not *prima facie* evidence of the want of probable cause, and among them is the case of *Israel v. Brooks*, 23 Ill. 575, 577, in which the writer of the opinion undertakes to state the reasons for holding that a discharge, by the magistrate, is not *prima facie* evidence of the want of probable cause, thus:

" \* \* \* How many justices are there in obscure localities who are as little capable of determining what is probable cause for a criminal prosecution as they are of explaining any of the phenomenon of nature? How many do we find prejudiced against a public accuser, how many in sympathy with the accused? The decisions of such an official on intricate questions of law or fact should not weigh against the accused and they do not practically; for, if he is committed, the grand jury pay no attention to the finding of the magistrate. It is not *prima facie* evidence of his guilt, and how preposterous it is to say the discharge of a criminal is *prima facie* evidence of want of probable cause. It is not so and should never be so regarded!"

This line of reasoning, which is quoted in *Davis v. McMillan*, *supra*, with approval, leads to an entirely erroneous conclusion.

Public officers are presumed to do their duty and their acts are presumed to be regular. While courts of general jurisdiction and of review may not indulge these presumptions in all respects as to courts of inferior and limited jurisdiction, yet

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they will presume that magistrates have intelligence enough to pass upon the questions which they are required to pass upon and that they do act honestly. Where a court of limited and inferior powers has acquired jurisdiction, its acts are presumed to have been rightly and honestly done. The fact that some magistrates may be ignorant and liable to be prejudiced does not overthrow the presumption. When a public officer, charged with the duty of determining a controversy, performs that duty the inference naturally and logically arises that his determination was just. Hence, since magistrates in our state are charged with the duty of determining the question of probable cause in criminal cases, such determination, in the absence of any other evidence, ought to be and is *prima facie* evidence of the fact determined. But this is true only when such magistrate has held a preliminary trial and has heard the evidence produced, because only then can he pass upon the question of probable cause.

The charge of the trial court in this respect was not erroneous.

Walters and Jones, JJ., concur.

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**APPEAL—INSURANCE.**

[Hamilton (1st) Court of Appeals, March 14 and April 10, 1914.]

Swing, Jones and Jones, JJ.

POSTAL LIFE INS. CO. v. HORACE W. HARMEYER ET AL.

\*HORACE W. HARMEYER v. INSURANCE CO.

**1. No Appeal from Cincinnati Superior Court to Court of Appeals.**

There is no right of appeal from the superior court of Cincinnati to the court of appeals, *Thompson v. Building Assn.* 7 Circ. Dec. 68 (13 N. S. 250), followed and approved.

**2. Assignee of Life Policy Limited to Insurable Interest.**

Under the assignment of a life insurance policy, the assignee is entitled to recover out of the proceeds only the amount of his insurable interest.

**APPEAL and ERROR.**

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\*Affirming, *Postal Life Ins. Co. v. Harmeyer*, 26 Dec. 141. Motion to certify record overruled by the Supreme Court, June 9, 1914, *Harmeyer v. Schmidt*, 59 Bull. 222.



*Insurance Co. v. Harmeyer.**Frank H. Kunkel*, for administratrix.*Thos. L. Michie*, and *C. C. Kearns*, for Harmeyer.**PER CURIAM.**

It was held in the case of *Thompson v. Building Assn.* 7 Circ. Dec. 68 (13 R. 250), that as the law then was there was no right of appeal from the superior court of Cincinnati to the circuit court. There has been no change in the law, organic or otherwise, since the decision in that case, affecting the question.

The motion to dismiss the appeal is sustained.

**SWING, J.**

This is an action in this court on error to the judgment of the superior court of Cincinnati. The action arose out of a policy of insurance issued by the Postal Life Insurance Company on the life of Adolph Schmidt. The life insurance company filed its petition in said court setting forth the policy and stating the amount due on the policy and brought the money into court making Carrie Schmidt, administratrix of Adolph Schmidt, deceased, and Horace W. Harmeyer defendants, alleging that both parties claim the proceeds of said policy.

Harmeyer and Schmidt both filed answers, each claiming to be entitled to the proceeds of said policy, excepting from it the amount paid by said Harmeyer, which was admitted by Mrs. Schmidt as being due to said Harmeyer, having been paid by him on said policy during its continuance.

Plaintiff below pleads that Schmidt took out a policy for \$5,000 on his life, in the Provident Savings Life Assurance Society of New York, April 27, 1896, and that he continued to pay the annual premiums on same until April 22, 1911, when he assigned said policy to Horace W. Harmeyer. The assignment is as follows:

“For value received I hereby assign and transfer unto Horace W. Harmeyer, No. 519 Main street, Room 208, Lincoln Inn Court, in the city of Cincinnati, state of Ohio, Policy of Insurance No. 76,203 issued by the Provident Savings Life Assurance Society of New York upon the life of Adolph F.

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Schmidt of Cincinnati, Ohio, and duly reinsured in the Postal Life Insurance Company, all dividends, benefits and advantages to be had or derived therefrom, subject to the conditions of the said policy and to the rules and regulations of the company, and subject and subordinate to any indebtedness to the company.

"It is expressly agreed that before any payment shall be made by virtue of this assignment, satisfactory proofs of the insurable interest of the assigned shall be furnished to the company, and the company shall not be liable for any sum in excess of such insurable interest.

"Witness my hand and seal, at Cincinnati, Ohio, this twenty-second day of April, 1911.

"(Signed) ADOLPH F. SCHMIDT."

The policy contained this provision:

"Any assignment of this policy must be in writing, and a duplicate thereof must be furnished the society. Any claim arising under an assignment shall be subject to satisfactory proof of insurable interest existing at the death of the insured or at the date of such claim, if prior thereto, and the society shall be liable to the assignee to the extent of that interest only; but the society will not assume any responsibility for the validity of an assignment."

On the back of the policy there was also written, at the same time, the following:

"CINCINNATI, O., April 22d, 1911.

"The consideration for which this agreement was made, having been fully paid and satisfied, I hereby relinquish all right, title and interest in Policy No. 76,203, on the life of Adolph F. Schmidt (and my estate as beneficiary) of Cincinnati, Ohio, as provided by this agreement. That said Horace W. Harmeyer, his heirs, assigns, becomes the beneficiary under said policy No. 76,203.

"Witness my hand and seal on the day and date above mentioned.

"Adolph F. Schmidt, Assignee.

"Signed in the presence of Edward L. Heckel, Witness."

**Insurance Co. v. Harmeyer.**

As stated, Harmeyer by virtue of this assignment claimed to be the sole beneficiary, whereas Mrs. Schmidt claimed that he was entitled to receive only the amounts paid on said policy together with the interest accruing thereon.

Under these pleadings the case was tried in said court and the following judgment rendered:

"This cause coming on to be heard on the petition of the plaintiff, the answer and cross petition of the defendant Horace W. Harmeyer, and Carrie Schmidt as administratrix of the estate of Adolph F. Schmidt, deceased, and the evidence, and the court being fully advised in the premises finds that the Provident Savings Life Assurance Society of New York issued a policy of insurance in the sum of five thousand (\$5,000) dollars on the life of Adolph F. Schmidt, and that the plaintiff the Postal Life Insurance Company assumed the payment of said policy; that among other conditions in said policy it was provided that in the event said policy is assigned by the insured, that the company shall be liable to the assignee to the extent of that insurable interest only; that said policy was assigned by the insured to one Horace W. Harmeyer subject to the conditions of said policy, and to the rules and regulations of the company, and it was further agreed in the said assignment that before payment shall be made by virtue of the assignment satisfactory proofs of the insurable interest of the assignee shall be furnished to the company and the company shall not be liable for any sum in excess of such insurable interest.

"The court further find that the plaintiff deposited with the clerk of the court the sum of \$4,533.19 which was the amount due under said policy after deducting an indebtedness of the insured in favor of said company.

"The court further find that the defendant Horace W. Harmeyer refused to furnish the plaintiff any testimony as to his insurable interest in the life of Adolph F. Schmidt, deceased, and that as a matter of fact the said Horace W. Harmeyer had no insurable interest in the life of Adolph F. Schmidt excepting as to the premiums and interest paid by him to the said

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company after said assignment of said policy by Adolph F. Schmidt to said Horace W. Harmeyer, which said premiums and interest are hereinafter referred to and ordered paid to said Horace W. Harmeyer.

"The court further finds that because of the conduct of the defendant Horace W. Harmeyer, through correspondence with the Insurance Department of New York and the Post Office Department at Washington, and through other acts whereby the plaintiff was being greatly injured, the said plaintiff was forced and did, as a matter of defense and protection to its interests, and in order to prevent further injury to its business, deposit said money with this court; that the depositing of said money under such circumstances did not constitute a waiver on the part of the company of the provision and terms of the policy providing that the said Horace W. Harmeyer shall establish his insurable interest in the life of Adolph Schmidt.

"The court further find on consideration of the answer and cross petition of the defendant, Horace W. Harmeyer, that the said defendant Horace W. Harmeyer is not entitled to the entire fund deposited so as aforesaid with the clerk of this court; that the said defendant Horace W. Harmeyer is entitled to the premiums paid by him to said company, to-wit: April 22, 1911, \$88.80; April 27, 1912, \$88.80; April 27, 1913, \$88.80; with interest thereon from said respective dates up to the date of this decree, amounting in all to \$294.53, and the further sum of \$72.75 interest paid by the said Horace W. Harmeyer on the loan of \$485 obtained by Adolph F. Schmidt in his lifetime from the plaintiff with interest thereon to date amounting in all to \$12.15, making a total of \$379.43, which amount the clerk of the court is hereby ordered to pay to said Horace W. Harmeyer or to Thos. L. Michie, his attorney.

"And the court coming now to the consideration of the answer and cross petition of the defendant, Carrie Schmidt, as administratrix of the estate of Adolph Schmidt, deceased, and the evidence, finds that the plaintiff was at all times and still is willing to pay the difference between the amount so found to be due to said Horace W. Harmeyer and the amount deposited

**Insurance Co. v. Harmeyer.**

with the clerk of this court to Carrie Schmidt, as administratrix of the estate of Adolph F. Schmidt, deceased, and the court doth now, therefore, order, adjudge and decree that the clerk of this court pay the balance of said fund remaining in his hands amounting to the sum of \$4,153.76 to the said Carrie Schmidt as administratrix of the estate of Adolph F. Schmidt, deceased, or to Frank H. Kunkel, her attorney."

To which decree exception is taken in the following language:

"To the foregoing decree Horace W. Harmeyer, by his counsel, duly excepts, and gives notice of appeal to the court of appeals of Hamilton county, Ohio, and the court hereby fixes the appeal bond at \$1,000."

No motion for new trial was filed, and no bill of exceptions was taken. The case is therefore before this court on the pleadings and the judgment entered.

At the conclusion of the argument in this court, the court announced that the judgment would be affirmed, without stating any reasons for the affirmance.

The legal question presented to us seems so clear that we hardly thought it necessary to consider the case further, or to give any reasons why the judgment should be affirmed.

The motion for re-hearing is now filed, and elaborate arguments have been presented to us, asking that the former judgment be set aside and judgment rendered for the defendant in error.

After giving the matter full consideration, we see no way by which we can reverse our former judgment. The issues were squarely made as to whether Harmeyer was entitled to the whole amount of the policy or whether he was limited to recovering the amount of his insurable interest. We are bound by the judgment that evidence was offered which would fully sustain the finding in favor of Mrs. Schmidt.

Judgment affirmed.

Jones, O. B., and Jones, E. H., JJ., concur.

## Carroll County Appeals.

**EXECUTORS AND ADMINISTRATORS—LIMITATION  
OF ACTIONS.**

[Carroll (7th) Court of Appeals, April Term, 1918.]

Pollock, Metcalfe and Norris, JJ.

LEWIS WALTERS, ADMR. v. JOHN D. HEIDY.

**Action for Value of Services Maintainable, Failure to Compensate by Bequest for Services Rendered, Limitation Runs from Appointment of Administrator.**

W agreed with H that if he would render her certain services she would, in compensation thereof, make a will giving him all the property she owned at the time of her death. H performed services under the agreement. W died intestate. Held:

1. H can maintain an action to recover the value of the services so rendered.
2. The statute of limitations does not begin to run against such action until the appointment of an administrator of W's estate.

[Syllabus by the court.]

ERROR.

*Wallace M. Handley*, for plaintiff in error.*I. N. Blythe*, for defendant in error.**METCALFE, J.**

Defendant in error was plaintiff below. In the second amended petition filed in the case it is averred in substance, that in February, 1890, he entered into a verbal agreement with Nancy Heidy, whereby he agreed to live with her upon her farm, known as the Tom Neely farm, as long as she desired him to do so, and that in compensation for his services to be rendered her in that behalf she agreed to make a will and give to him all the property she owned at the time of her death. That in pursuance of that agreement he did move onto said farm and for a period of about two years gave his work and labor to the said Nancy Heidy, and performed services which he claims were of the value of a thousand dollars. In the meantime Nancy Heidy married Lewis Walters, plaintiff in error in this case,

## Walters v. Heidy.

and some time after her marriage with Walters Heidy moved away from the farm. Nancy Walters died in 1910 intestate, and after the appointment of an administrator Heidy brought his action to recover the value of the services which he claims to have rendered under his agreement with her. Upon the trial of the case Heidy recovered judgment. A number of questions are urged in argument, but we think the only questions of importance are, whether the action can be maintained, and if so whether it is barred by the statute of limitations.

That the agreement of Mrs. Walters to compensate Heidy for his work by will was within the statute of frauds, and that no action can be maintained thereon for specific performance or for damages seems clear. *Austin v. Davis*, 128 Ind. 472 [26 N. E. Rep. 890; 12 L. R. A. 120; 25 Am. St. Rep. 456]; *De Moss v. Robinson*, 46 Mich. 62 [8 N. W. Rep. 712; 41 Am. Rep. 144]; *Wallace v. Long*, 105 Ind. 522 [5 N. E. Rep. 666; 55 Am. Rep. 222]; *Pond v. Sheean*, 132 Ill. 312 [23 N. E. Rep. 1018; 8 L. R. A. 414]; 25 Am. L. J. 69.

But if no action can be maintained upon the contract, does it follow that if services are rendered in pursuance of a mutual understanding that compensation shall be made therefor by will, and the party receiving the services dies without making the expected compensation, that the party rendering the services may not recover their value from the estate of the deceased? Without entering into a discussion of this question we think the right to recover in such case is fully sustained by the following authorities: *Robinson v. Raynor*, 28 N. Y. 494; *Martin v. Wright*, 13 Wend. (N. Y.) 460 [28 Am. Dec. 468]; *Parsell v. Stryker*, 41 N. Y. 480; *Jenkins v. Stetson*, 91 Mass. (9 Allen) 128; *Wellington v. Aphorpe*, 145 Mass. 69 [13 N. E. Rep. 10; 57 Am. Rep. 759].

It is urged that the statute of limitations began to run at the time Heidy ceased to labor on the farm, and hence that his cause of action is barred. Upon the question of the statute of limitations the trial judge charged the jury as follows:

"If upon consideration of all the evidence adduced on the trial you find that said agreement between plaintiff and dece-

## Carroll County Appeals.

dent as claimed by plaintiff was in fact made, that said plaintiff was to be compensated for said alleged services rendered, and means of support furnished, if any, and that he was not to receive such compensation until the death of Nancy J. Walters, then in such event I say to you as matter of law that his cause of action therefor would not arise and would not accrue to him until the date of said Nancy J. Walters' death, which is admitted to be May 19, 1910, and in such event, plaintiff's cause of action would not be barred by the statute of limitations."

The evidence in this case tends to show that the services which Heidy was to render for Mrs. Walters were to be paid at her death by a provision in her will. The manner in which they were to be paid is a matter of indifference. The question is was the compensation to be made at her death. If Heidy was not to be paid until her death how could a cause of action arise before that time? In the case of *Marsh v. Clark*, 11 Dec. 564, it is held that where an uncle agreed to compensate his nephew by will for services that the statute of limitations did not begin to run until the death of the uncle. In *Hoiles v. Riddle*, 74 Ohio St. 173 [78 N. E. Rep. 219; 113 Am. St. Rep. 946], the holding is to the effect that in an action on a contract not in writing which became due by the decease of the debtor the cause of action does accrue until the appointment of an executor or an administrator. We do not think that the fact that the contract in this case could not be enforced specifically makes any difference in the application of the principle announced in *Hoiles v. Riddle*, and that the statute would not begin to run until the appointment of an administrator for Mrs. Walter's estate. And as the death of Mrs. Walters and the appointment of the administrator occurred within six years prior to the commencement of the suit the statement in the charge that the statute began to run at the death of Mrs. Walters is not prejudicial.

Judgment affirmed.

Norris and Pollock, JJ., concur.



Moesser v. Lumber Co.

### MECHANICS' LIENS.

[Hamilton (1st) Court of Appeals, October, 1915.]

Jones, Jones and Gorman, JJ.

(Jones, E. H., J., not sitting.)

LOUIS MOESSER v. ENTERPRISE LUMBER CO. ET AL.

**Owner Need not Stop Payment of Checks to Subcontractors Mailed before but on Same Day Mechanic's Lien Filed if Balance Due on Building Exceeds Sum of Checks and Mechanic's Lien.**

An owner, mailing checks to certain subcontractors and material men on the day of the filing of a mechanic's lien by another subcontractor, is not required to stop payment on the checks if the amount due for construction of the building is not less than the amount of the checks plus the amount of the lien; but subcontractors and material men who did not file with the owner itemized statements of the amounts due them within ten days after the filing of the lien are not entitled to pro rate with the lien holder or the payees of the checks in the amount remaining due.

ERROR.

*C. W. Hoffman and Chas. M. Leslie*, for plaintiff. in error.

*W. F. Chambers, Hunt, Bennett & Utter, Miller & Foster, W. A. Rinckhoff, Wolf & Bailey, Tuttle & Ross and Hackett, Yeatman & Harris*, for defendants in error.

JONES, O. B., J.

The proceeding below was brought by the Enterprise Lumber Company seeking to recover the amount due to it for materials furnished for the construction of a house by the Louis Belmont Company as head contractor for Louis Moesser, plaintiff in error herein.

The Enterprise Lumber Company filed a claim as material man, in accordance with Sec. 8324 G. C. There is no dispute but that it followed the statute and perfected a material man's or subcontractor's lien upon the balance due from the owner for the construction of said house. This affidavit and notice to the owner thereunder were filed April 10, 1913, and the amount

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found due to the Enterprise Lumber Company thereunder was \$483.24, with interest.

On the day previous to the filing of this notice plaintiff in error claims to have drawn checks to certain subcontractors and material men amounting to \$550.15 which were put in the mail on the morning of April 10, 1913. If this were done as claimed, before receipt of notice from the Enterprise Lumber Company, it was still within the power of plaintiff in error to have stopped payment upon these checks if the amounts covered by, them would reduce the amount due for the construction of said house to a sum less than the amount claimed by the subcontractor's lien. The question is raised between the parties as to whether these checks were actually mailed before the notice was filed, but as the amount found to be due in addition to the amount of these checks is larger than that due the Enterprise Lumber Company, it becomes immaterial as to it, whether they were beyond the control of plaintiff in error before the receipt of the notice served upon him for said Enterprise Lumber Company's lien.

Under the terms of Sec. 8328 G. C., in order that other subcontractors might be permitted to pro rate with the Enterprise Lumber Company it was necessary for them, within ten days from the date of the filing of the lien by the Enterprise Lumber Company with the county recorder, to file sworn and itemized statements of their several accounts with the owner. The record shows that no such statement was filed by any of the subcontractors who are parties herein, earlier than April 30, 1913. Therefore, under the terms of the statute, which has been so construed in the case of *Hayden Saddlery Hardware Co. v. Slade*, 2 Circ. Dec. 38 (3 R. 67), the Enterprise Lumber Company was entitled to be first paid out of the fund; and as the checks of the owner aggregating \$550.15, which were mailed April 10, 1913, were then due and were paid before any statements as to other claims were filed, in accordance with the terms of Sec. 8328 G. C., these payments made by these checks must be treated as proper payments as far as all the other subcontractors and material men are concerned.

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The judgment of the lower court was, therefore, erroneous in finding that the owner must be deemed as having in his hands \$1,103.40 subject to the payment of claims. The payments made by the owner's checks of April 10, 1913, should have been deducted from this amount and the balance with interest, only, would be available for the claims of all sub-contractors and material men, out of which the Enterprise Lumber Company must first be paid and the balance pro rated among other claims.

The judgment of the lower court is therefore reversed and the cause remanded for further proceedings.

**Gorman, J., concurs.**

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**BASTARDS.**

[Hamilton (1st) Circuit Court, June 3, 1911.]

Smith, Swing and Jones, JJ.

**\*JOHN CAMPBELL V. STATE, EX REL. CAIN.**

**Order of Admission of Evidence in Bastardy Case Discretionary with Court.**

In the trial of a bastardy case as provided by Sec. 12122 G. C., failure to read before complainant rests the transcript of the evidence given by the complainant before the magistrate, does not constitute prejudicial error where the reading of the transcript occurred before the defendant was placed on the witness stand.

**ERROR.**

*Thomas H. Kelley*, for plaintiff in error.

*Jos. T. Harrison*, for defendant in error.

**JONES, J.**

The jury found the defendant below guilty as charged in the complaint after hearing the evidence adduced and proper instructions by the court.

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\*Affirmed, no op., *Campbell v. State*, 88 O. S. 586.

## Hamilton County Circuit.

We think the failure of plaintiff below to read the transcript of complainant's evidence, as given before the magistrate, at the proper time is not prejudicial error.

The transcript was referred to in the trial by counsel before plaintiff rested and it was within the discretion of the court to permit it to be read later, especially as it was read before defendant placed a witness on the stand.

The evidence is conflicting, as it always is in cases of this nature. The jury heard it with full opportunity to note the interest and demeanor of the witnesses and were the sole judges of the reliability and credibility of the testimony offered.

Finding no error the judgment will be affirmed.

Smith and Swing, JJ., concur.

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**ACCOUNTING—EQUITY—MORTGAGES.**

[Hamilton (1st) Court of Appeals, July 19, 1915.]

Jones, Jones and Gorman, JJ.

OTTO KRIPPENDORF V. HELEN M. ORMSBY.

(3 Cases.)

**1. Reference to Master Commissioner Proper in Equitable Proceeding to Construe and Enforce Contract and Accounting.**

A suit to construe and enforce a contract and for an accounting thereunder, for a decree for the reconveyance of realty and for general relief is a cause in equity, all matters being triable to a court and not a jury, comes within the provisions of Sec. 11490 G. C. and reference to a master commissioner is not an abuse of discretion by the court.

**2. Judgment Debtor Contrary to Judgment Creditor Cannot Compel Foreclosure Sale.**

A judgment debtor in a foreclosure suit cannot compel a sale under decree of foreclosure and order of sale contrary to the wishes and right of a judgment creditor who is the owner of the judgment and mortgage in issue, and the trial court properly on application of the judgment creditor properly ordered recalls of orders of sale issued upon the precept of the judgment debtor therein.

**3. Prayer for Equitable Relief Effective to Cure Technical Defects in Terms of Pleading Setting Out Sallent Facts in Issue.**

A contract to reconvey property to grantor upon payment of money advanced or loaned by grantee acting as attorney for

*Krippendorf v. Ormsby.*

the grantor is in the nature of a mortgage; hence, notwithstanding the petition in an action to reconvey and for an accounting, and praying for specific performance and equitable relief does not in terms designate the contract as a mortgage, nor set out the relation of attorney and client, if it sets forth the salient terms of the contract and does in fact state a cause of action for a redemption of the mortgage and shows that the grantee holds the property in trust for grantor, the court may, under the general prayer for equitable relief, order the reconveyance and an accounting.

**ERROR.**

*J. M. Dawson*, for Krippendorf.

*J. C. Martin*, and *Wm. M. Fridman*, for Helen M. Ormsby.  
*Young & Young*, for Geo. S. Ormsby.

**JONES, O. B., J.**

Three proceedings in error have been brought in this court, growing out of an action in the superior court of Cincinnati in which the defendant in error was plaintiff, and the plaintiff in error was defendant, and in which plaintiff sought to require the defendant to reconvey to her certain real estate which she had conveyed to him under a certain contract in accordance with the terms of which he was to advance certain money and out of it to pay certain liens upon said real estate, and to hold and rent same and out of the income pay taxes, make repairs and improvements, and the end of three years upon repayment to him of the amount advanced to reconvey said real estate to her.

The University of Wooster was made party defendant and filed a cross petition setting up a mortgage made by the defendant below to it to secure a loan of \$5,000 upon lot 49 which was the improved portion of said real estate, and a judgment was afterwards entered on said cross petition finding the amount due under said mortgage and ordering the foreclosure of same and sale of the premises covered by the mortgage on the failure to pay the amount so found due.

The case proceeded as between the original plaintiff and defendant, and was heard upon her second amended petition, the answer of defendant thereto, and the reply to said answer. Upon said hearing the court decided in favor of the plaintiff

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and found upon the evidence that the allegations of her second amended petition were true, and that she was entitled to have the contract performed by the defendant and its provisions enforced against him, and that she was entitled to have a reconveyance of all the property mentioned in said contract, imposed by him, excepting the mortgage to the University of Wooster free from all encumbrances, upon the payment by her of such sums with interest as had been advanced by defendant upon her account under said contract; and for the purpose of stating an account showing the amount so due from plaintiff to defendant the court appointed Murry M. Shoemaker as a master commissioner with all the power of a referee, to take such an account and to ascertain and report to the court the amount so due to the defendant.

The first proceeding in error, No. 304, seeks to set aside this judgment as being erroneous and invalid, and questions the power of the court to appoint a master commissioner as therein provided.

The cause is one in equity, being a suit to construe and enforce a contract and for an accounting thereunder, for a decree for the reconveyance of land and for general relief. These are all matters triable to a court and not to a jury, and come within the provisions of Sec. 11490 G. C. Under this section reference to a master commissioner is discretionary with the court, and in this case the court has in no way abused its discretion.

The second proceeding in error, No. 461, was brought for the purpose of reviewing the final judgment and decree of the superior court which was entered in said case upon the report and finding of the master commissioner and referee appointed therein and which fixed the amount ordered paid by the plaintiff to the defendant in full satisfaction of all amounts advanced and paid by him under said contract, and provided that upon such payment by the plaintiff said defendant should reconvey all of said real estate free and clear of all incumbrances.

In this proceeding in error a complete bill of exceptions was filed, but the original pleadings and papers having been

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filed in the first case, No. 304, were not refiled herein out only such papers as had been filed in the lower court subsequent to the original proceeding in error. And the transcript of the docket and journal entries in the lower court filed in this second case included only those subsequent to February 2, 1914, being a continuation of the transcript filed in case No. 304. As each of these proceedings in error is technically distinct from the other, there might be a question as to the power of the court to consider one case as merely a supplement of the other, but as the main question involved is the same in both cases, they will be treated together and considered as one.

The third proceeding in error, No. 577, involves the right of a judgment debtor in a foreclosure suit to insist upon a sale under decree of foreclosure and order of sale, contrary to the wishes and right of the judgment creditor who is the owner of said judgment and mortgage.

A decree in foreclosure was taken upon the cross petition of the University of Wooster under its mortgage made to Otto Krippendorf upon Lot 49, part of the real estate involved in said contract, and an order for sale had been issued upon the precept of the attorneys for the University of Wooster and the property was advertised thereunder for sale by the sheriff, whereupon George S. Ormsby the father of Helen M. Ormsby, for her protection and assistance purchased from the University of Wooster all its interests under said mortgage and judgment and recalled said order for sale.

Afterwards, Otto Krippendorf, the judgment debtor in said decree of foreclosure, without authority from or notice to said George S. Ormsby or the University of Wooster filed a precept for a second order of sale, which was issued by the clerk, and sale was advertised thereunder by the sheriff. Upon motion George S. Ormsby was made party defendant, and he made application to the court for an order to set aside and recall the second order of sale which had been issued at the instance of said defendant, Otto Krippendorf; which motion upon hearing the court granted, and made an order setting aside and recalling said second order of sale. Said defendant, Otto Krip-

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pendorf, also moved the court to require said George S. Ormsby to give security for costs, he being a nonresident of Hamilton county, Ohio. This motion was denied by the court on the ground that it appeared to the court that Ormsby was the owner of the mortgage and judgment interest in said real estate, which afforded ample security for costs. To this order the defendant Krippendorf also excepted.

The third proceeding in error was brought to secure a reversal of these two orders. In the opinion of this court the action of the court below upon both of said motions was both proper and legal. But neither of said orders is a final order which can be reviewed by proceedings in error by this court, and the petition in error in case No. 577 will therefore be dismissed at the costs of plaintiff in error.

The main question in the first and second proceedings in error is as to the correctness of the judgment below finding the equities in favor of the plaintiff.

The evidence shows that Mrs. Ormsby being the owner of a handsome dwelling on the lot known as No. 49 of the Foote subdivision, was in embarrassed circumstances, a decree of foreclosure having been taken upon the mortgage on said property by the University of Wooster, and it was about to be sold to satisfy the judgment of such foreclosure; that other judgments had been taken against her for money; and the taxes on said property were unpaid. When in search of assistance towards the raising of money necessary to adjust her financial difficulties she met Otto Krippendorf who is an attorney at law and who agreed to act for her as such and to advance money necessary to prevent the sacrifice of her home. To effect this purpose it was agreed that Krippendorf would raise money to the amount of \$7,500; that a conveyance of said lot No. 49, together with three other lots, would be made to him by Mrs. Ormsby; and that out of the \$7,500 he was to pay all tax claims on lot 49, the court costs and judgment in said foreclosure case brought by the University of Wooster, and certain improvements to the premises on lot 49; and the form of contract to this effect was drawn by said Krippendorf and executed by Mrs. Ormsby and



**Krippendorf v. Ormsby.**

Krippendorf in the presence of two witnesses, and duly acknowledged by both of them before a notary public.

It appears from the evidence that by virtue of this contract, and a deed made at the same time as a part of the same transaction by Mrs. Ormsby to Mr. Krippendorf, her title in said four lots was vested in Krippendorf who was then acting as her attorney and trustee under the terms of said contract. The sheriff's sale in the foreclosure case of the trustees of the University of Wooster was confirmed and a deed was executed by the sheriff conveying lot 49 to the trustees of the University of Wooster, who, carrying out an arrangement previously made with Mrs. Ormsby, received at the hands of Krippendorf sufficient money to pay the court costs and tax claim and to reduce their indebtedness from Mrs. Ormsby down to \$5,000 for which Krippendorf executed a mortgage to them upon said lot 49.

By the terms of said contract Krippendorf agreed to re-convey to Mrs. Ormsby, upon the termination of said term of three years, to-wit, on May 6, 1912, the same interest in said four lots provided she pay to him in gold coin the principal sum of \$5,000 and interest and \$2,500 and interest, together with all incidental sums by way of taxes, assessments, interest on mortgages, charges for improvements or otherwise, and interest at 6 per cent per annum from the date of maturity. The contract further gave to Mrs. Ormsby during its existence a right to accelerate a reconveyance of said property providing she assume and take subject to the mortgage of \$5,000 and all other claims and demands growing out of the contract.

A careful consideration of this contract in connection with the evidence given shows that its whole purpose, and the purpose of the conveyance made by Mrs. Ormsby to Krippendorf, was simply to furnish the means for securing money, which he agreed to raise and advance on her account. In other words, this so-called contract was in fact a mortgage. The conveyance was undoubtedly made to him by her and at her request by the trustees of the University of Wooster, for the purpose of vesting title in him as her trustee for her benefit and at the same

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time to secure him in the repayment of any money necessary to be advanced by him. Although the contract is drawn in an involved and extremely vague way, it shows evidence of having been prepared either by a lawyer who was without sufficient experience to clearly state what was intended to be covered in it—to provide proper security for himself in advancing funds and at the same time protect the rights of his client who was to be the beneficiary of such advancement; or else it was the product of a crafty and unscrupulous lawyer, who, seeking to take advantage of a confiding client ignorant of such documents, at the end of her resources and eager to find a way out of her financial difficulties, created a document under which he might if occasion arose claim to be the absolute owner of the property and hold her to the exact time fixed for reconveyance under the strict letter of the contract in the manner of an historical Shylock.

The fact that Krippendorf failed in any way to report his expenditures to Mrs. Ormsby or to furnish to her an account of the amount of his advancements under the contract, and that he failed to keep the property rented or in repair, and the further fact that the value of the property has largely appreciated, taken in connection with his testimony as given in this case, places him in anything but a favorable attitude before the court. He had hardly signed the contract under which he appeared as the friend and benefactor of Mrs. Ormsby until he laid plans to repudiate it and his testimony indicates a constant effort on his part to retain for himself the property which he obtained as a trustee for a client, and, failing to hold it, to require her to pay the largest amount possible to him in excess of all advancements and interest.

There is no question but that this contract was drawn as a security for a loan or advancement to be made by Krippendorf on behalf of Mrs. Ormsby and, under the doctrine of the case of *Wilson v. Giddings*, 28 Ohio St. 554, it must be held to be a mortgage. As was said in the opinion of the court in that case, at page 565:

“There is no principle in equity more firmly settled on

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authority than that every contract for the security of debt, by the conveyance of real estate, is a mortgage, and that all agreements of parties tending to alter, in any subsequent agreement, the original nature of the mortgage, is of no effect. \* \* \*

"The rule is general that where a contract and conveyance are made upon a negotiation for a loan of money, a court of equity will always construe the conveyance to be a mortgage, whatever may be the form of the contract. \* \* \*

"Whatever form the transaction assumes; whatever covenant there may be in the conveyance, or in an agreement accompanying it, if it was founded upon a loan of money, and intended by the parties to be a mortgage, courts of equity will always so construe it."

It is not necessary to multiply authorities to sustain the principle that once a mortgage is always a mortgage.

Nor is it necessary to cite cases that a party occupying a trust relation cannot take advantage of his position.

Counsel for plaintiff in error concedes both of these propositions, but he relies upon a criticism of the pleadings and insists that a technical meaning be placed upon them. It is true that the petition does not in terms declare the so-called "contract" to be a "mortgage," but it does set out the salient terms of the contract, and does in effect state a cause of action for a redemption of a mortgage although in terms it asks for a reconveyance of real estate under the terms of the contract, praying for specific performance, and at the same time praying for general relief.

It is true that the petition does not set out the relation of attorney and client as existing between Mr. Krippendorf and Mrs. Ormsby, but it does set out enough of the terms of the contract to show that he held this real estate as her trustee with an obligation to reconvey to her.

It is also true that the reply undertakes improperly to set out this relation of attorney and client as between these parties. Such an allegation in the reply cannot be considered as enlarging the case of the plaintiff as made by the petition. *Hilsinger*

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v. *Trickett*, 86 Ohio St. 297 [99 N. E. Rep. 305; Ann. Cas. 1913 D. 421n].

But as stated above, the trust relation sufficiently appears from the allegations of the second amended petition.

The action being in equity and the prayer for relief being a general one, the court has jurisdiction to grant relief warranted by the facts as proven.

*Lockhart v. Leeds*, 195 U. S. 427 [25 Sup. Ct. Rep. 76; 49 L. Ed. 263]; *Haggart v. Wilczinski*, 143 Fed. Rep. 22 [74 C. C. A. 176]; *Rexford v. Woodland Co.* 208 Fed. Rep. 295; *Central Improvement Co. v. Steel Co.* 210 Fed. Rep. 696; 16 Cyc. 106.

The defendant below contends that under a strict construction of the contract upon which he relies Mrs. Ormsby failed to perform her obligation to convey to him, as provided by Par. 8, said real estate, free and clear of all claims, demands and incumbrances. From the fact that he drew the quitclaim deed, which she executed, at the same time as the contract and that he did not ask for any other deed or further conveyance from her, it must be held that the quitclaim deed then executed by her was substituted in place of the deed referred to in Par. 8. It is natural to believe that, in her harassed and helpless condition she relied upon him to free her property from its incumbrances, and clearly did not intend to obligate herself to first free it from incumbrances for the privilege of conveying it to him in order that he might hold the title entirely free except for the mortgage to be placed on it by him for \$5,000 to the University of Wooster.

The construction of the contract claimed by the defendant is contrary to the evidence and contrary to its own terms. The unreliable and contradictory statements given by the defendant in his testimony with regard to the \$2,000 consideration named in the deed from Mrs. Ormsby to himself lead us to give doubtful credence to his testimony, and to feel, that he will be amply repaid in the amount found by the court below to be due him for advancements.

In this amount was included a \$500 attorney fee, as fixed by Par. 5 of the contract. It should be observed that nowhere

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In the contract does Mrs. Ormsby agree to pay this fee, nor is it in any way made a charge upon said real estate or considered as one of the advancements to be made by Krippendorf under the contract. The evidence shows that this fee was only for services rendered in connection with this real estate and the making and performance of this contract. It is extremely doubtful whether, under all the circumstances of the case, such an allowance should be made, but as no objection was made by plaintiff below to its allowance and as there is no cross petition in error in this case on behalf of Mrs. Ormsby, we have concluded not to disturb the finding as made by the master commissioner and confirmed by the trial court.

A careful consideration of the numerous points of error relied upon by plaintiff in error convinces us that there is no prejudicial error shown by the record as against him, but that substantial justice has been done.

The judgment below is therefore affirmed.

Jones, E. H., and Gorman, J.J., concur.

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**ELECTRICITY—MUNICIPAL CORPORATIONS—  
STREETS.**

[Lucas (6th) Court of Appeals, June 7, 1915.]

Richards, Chittenden and Kinkade, J.J.

**ELLEN HUSS v. TOLEDO RAILWAYS & LIGHT CO.**

1. Private Electric Light Company May Erect and Maintain Poles and Wires in Front of Residence Property for Lighting Streets Notwithstanding Private Lighting is also Conducted thereon.

A private company may erect and maintain in the streets of a municipality and in front of residence property, electric light poles and wires for lighting the public streets under contract with the city, and such construction does not invade the rights of the abutting owner; and such owner cannot main-

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tain injunction even though a portion of the current carried is for private purposes, provided such additional use does not impair the abutter's property in any essential degree.

**2. Municipal Authorities Regulate Location of Poles and Wires in Streets.**

The location of the poles and wires for lighting the public streets rests with the city authorities and will not be interfered with by the courts in the absence of fraud or an abuse of discretion.

[Syllabus by the court.]

**APPEAL.**

*Charles A. Thatcher*, for plaintiff.

*Tracy, Chapman & Welles*, for defendant.

**RICHARDS, J.**

This action was commenced by filing a petition in the court of common pleas on April 30, 1915, seeking to enjoin the defendant from erecting poles and stringing wires thereon in front of the property of the plaintiff on Williams street in the city of Toledo. To this petition the defendant filed an answer in which it avers that it has a contract with the city of Toledo, by the terms of which it is to furnish street lights for the streets, boulevards and parks in the city of Toledo, and is proceeding to erect a line on Williams street for that purpose, having received a permit therefor from the proper officials of the city. The defendant further avers that no wires are to be placed on the line of poles except such as carry current for the above purposes.

The evidence discloses that the plan of construction involves the placing of only one pole in front of the premises of the plaintiff, and the precise location of that pole has been heretofore fixed by order of this court. It appears further from the evidence that the plan involves the placing of eleven high tension wires to be used almost, if not entirely, for street lighting purposes. The poles are also to carry four wires composing a 3-phase, 60 cycle, A. C. circuit, carrying 4600 volts. No serious question can be made as to the right of the defendant to construct the line in the place located, for the purpose of street lighting, including the eleven wires carrying current for are

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lights; but it is strenuously insisted that the defendant has no right to erect or maintain the four other wires which are used not only for street lighting, but for other private purposes. The evidence discloses that these four wires compose one circuit and that such method is proper for good construction. It appears that the current from these four wires is used for lighting the streets; the drives, walks and buildings in Walbridge Park; the union depot and the grounds and streets adjoining the same; and also for general lighting of the fire departments on Broadway, and lighting and power at the water-works station on Broadway, and general distribution of incandescent lighting in the vicinity of Broadway and extending to Glendale avenue. None of the wires named will carry current to be used solely for private incandescent lighting, nor solely to carry energy for private power plants. On the contrary, the four wires named serve a dual purpose, one of the chief purposes being the lighting of the public streets in that portion of the city. It does not appear from the evidence that the use of a portion of this current for private purposes has necessitated, or will necessitate, any larger poles or wires, or a greater number of wires or cross-arms.

We assume that the defendant has the right in this state, without any doubt, to erect and maintain a line of poles and wires for the purpose of lighting the public streets of the municipality, and the question here for determination is whether that right is in any wise curtailed by the fact that the same line of poles and wires carries current which is used in part for private purposes. The leading case in Ohio on this matter is *Callen v. Light Co.* 66 Ohio St. 166 [64 N. E. Rep. 141; 58 L. R. A. 782]. In that case it was announced by the court that it was a diversion of the street from the purposes to which it was dedicated, for a private lighting company to erect poles and string wires thereon of electric light cable lines for furnishing light and energy to private takers. It was further held in that case that this diversion of the street from the purposes for which it was dedicated was not relieved against by the fact that a fire alarm box used by the city was placed on

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the pole erected adjacent to plaintiff's property. It is true that the question to be determined in the case of *Callen v. Electric Light Co. supra*, was not precisely the same as that which we have for determination, because in that case the company had no contract for lighting any of the streets of the city in the neighborhood where the plaintiff's property was located, nor was it in fact furnishing or proposing to furnish any such service at that place, and hence it could not claim the right to erect or maintain the line of poles and wires at that place for street lighting purposes. In the consideration of that case the Supreme Court, speaking through Spear, J., discusses in detail the question now under consideration in the instant case. It is said in the course of that opinion that the case is to be determined by a consideration of the question whether or not the acts of the defendant complained of constitute in an essential degree a taking of property within the meaning of the constitution, and it is further stated by the court, in substance, that the defendant did not have the right to place permanent erections in the street in front of the plaintiff's property if by so doing, it in any appreciable degree impaired the owner's access to the lot, or otherwise interfered with the full enjoyment of the lot for all purposes to which it was adapted, or of the street itself. It must be borne in mind, in considering the discussion of that case and the conclusion reached by the court, that it had under consideration a case in which the electric lighting provided by the defendant was not of the streets, but that it was wholly for private use and, therefore, was not in any sense a street purpose, but was solely a private one. The fundamental principle was stated by the court that the city's control of the streets is confined to street purposes and is not for general municipal purposes. Nevertheless, the court used this language on page 180:

"Whatever is a necessary incident to that use, the city may provide. Sewers, for instance, drain the surface water and thus relieve the streets from impairment and destruction, and in this respect sewers are for a street purpose; while, in addition, they may drain abutting property, thus tending to pro-



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mote the public health, and in this respect they serve a municipal purpose. The same may be said as to water supply for cleansing and sprinkling the streets, and by owners of property abutting for cleaning and domestic uses, and for the extinguishment of fires. Light, also, is necessary for street purposes, and is convenient for the use of citizens, thus serving two uses, one a street purpose and the other a municipal purpose."

The fact that fire alarm apparatus was a strictly municipal convenience was held not to justify the construction, for it was apparent that this apparatus might properly be constructed on a short post in an unobjectionable location. The language above quoted is a clear declaration by the Supreme Court that poles and wires constructed for purposes of furnishing light for the public streets may serve as well a dual purpose, and if such dual purpose did not result in impairing the plaintiff's property in any essential degree, or to any appreciable extent, then injunction would not lie.

The doctrine is well announced in 1 Joyce, Elec. Law (2 Ed.) Secs. 233, 276 and 333. The author of that work in an illuminating discussion of the question, reaches the conclusion that if a line of poles and wires is erected for the purpose of lighting the public streets, it is not an additional burden that the same line also carries current used for private purposes.

We conclude from the evidence in this case that no appreciable or essential additional burden is cast upon the plaintiff's property by the fact that the current for lighting the public streets which is carried on some of these wires, is also used for various private purposes.

It is insisted by the plaintiff that the line of poles and wires should have been constructed on another street or on the opposite side of Williams street. No abuse of discretion is shown on the part of the city authorities in locating the line at the place where it has been located, with the pole in front of plaintiff's property placed where directed by this court, and we apprehend the true rule to be that in the absence of fraud or an abuse of discretion, a court will not interfere with the action of the municipal authorities on that matter. Of course, the

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right of the defendant to maintain this line could only extend for the time during which it supplies light for lighting the public streets of the city.

The injunction will be so modified as to allow the erection and maintenance of the pole on plaintiff's property at the place indicated, only, and in other respects will be dissolved.

**Chittenden and Kinkade, JJ., concur.**

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**MUNICIPAL CORPORATIONS—WORK AND LABOR.**

[Cuyahoga (8th) Court of Appeals, November 15, 1915.]

**Meals, Grant and Carpenter, JJ.**

**OTTO STANGE V. CLEVELAND (CITY).**

**Power of Charter City to Regulate Hours of Day Labor on Public Improvements Before State Act Takes Effect.**

A municipality having adopted a charter pursuant to Art. 18, Sec. 3, of the constitution, the Home Rule amendment, may enact police regulations which differ from police regulations enacted by the general assembly. Hence, an ordinance of a charter city, prescribing an eight hour day labor limitation on public work in pursuance of Art. 2, Sec. 37, of the constitution, and imposing a penalty for its violation, is a valid enactment, notwithstanding it was passed and took effect prior to the enactment and taking effect of Act 103 O. L. 854 (Secs. 17-1 and 17-2 G. C.), includes all workmen so engaged, and applies to violations thereof occurring before the state act took effect.

**ERROR.**

*Squire, Sanders & Dempsey*, for plaintiff in error.

*John N. Stockwell*, city solicitor, *Arthur F. Young*, assist., city solicitor, for defendant in error.

**MEALS, J.**

The plaintiff in error was convicted in the municipal court of violating an ordinance of the city of Cleveland providing for an eight hour day on public work. The judgment of the municipal court was affirmed by the court of common pleas. Error is prosecuted to the latter judgment.

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The affidavit filed in the municipal court against the plaintiff in error charges the latter as follows: That on December 1, 1914, Otto Stange then and there being the superintendent and person in charge and control of a certain plant known and designated as "Casey and Company," at which said plant work of a public nature was then being conducted, to-wit; work on the installation of a water filtration plant for the city of Cleveland, a municipal corporation, unlawfully did then and there permit the workmen in his employ and under his control at said place as aforesaid to labor more than eight hours per day; that said labor so performed as aforesaid not being then necessary as an extraordinary emergency and said laborers so mentioned as aforesaid not then and there being policemen or firemen.

To this affidavit a demurrer was interposed on the ground that the same did not state facts sufficient to constitute an offense against the laws of the state of Ohio, which demurrer was overruled.

The principal question presented to us relates to the action of the court in overruling the defendant's demurrer. Other questions are made by the record, but they are of secondary importance.

It is contended by the plaintiff in error that the ordinance for the violation of which he was convicted, is void.

Section 37, Art. 2 of the constitution of Ohio, as amended in 1912, provides:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

It will be observed that no penalty is provided for the violation of this section. Therefore, to enforce its mandate, an act was passed by the general assembly on April 13, 1913, entitled, "An act to provide for an eight hour day on public work in the state, or any political subdivision thereof, or by contract-

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ors or subcontractors on behalf of the state or any political subdivision thereof, and penalties for violation of same." This act provides as follows:

"Section 1. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.

"Sec. 2. Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both.

"Sec. 3. This act shall be in force and applicable to all contracts let on and after July 1, 1915."

Sec. 3, Art. 18 of the constitution, as amended in 1912, provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

Sec. 7, Art. 18 of the constitution reads as follows:

"Any municipality may frame, adopt or amend a charter for its government, and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

The court will take judicial notice that on July 1, 1913, in pursuance of the authority given by the latter section, the city of Cleveland, by a vote of its people, adopted a charter for its government. Section 196 of this charter provides as follows:

"Hours of Labor. Except in case of extraordinary emer-

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gency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work for workmen engaged in any public work carried on or aided by the municipality, whether done by contract or otherwise. The council shall by ordinance provide for enforcement of the provisions of this section."

As in the case of the constitutional provision on the same subject, no penalty is provided in the charter for the violation of this section. Therefore, to enforce compliance with Sec. 196 of the charter, the city of Cleveland, on October 13, 1914, passed the following ordinance:

"Section 1. Be it ordained by the council of the city of Cleveland, state of Ohio: That except in cases of extraordinary emergency not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work for workmen engaged on any public work carried on or aided by the city of Cleveland, whether done by contract or otherwise, and it shall be unlawful for any person, corporation, or association who shall employ or direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week except in cases of extraordinary emergency.

"Section 2. Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction, be fined in any sum not to exceed \$500, or be imprisoned not more than six months, or both.

"Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

The plaintiff in error was convicted of violating this ordinance.

Counsel for the plaintiff in error contend that the ordinance is in conflict with the general law and therefore void.

Section 3, Art. 18 of the constitution, as amended in 1912, is a grant of powers from the people of the state to the municipalities of the state. *Fitzgerald v. Cleveland*, 88 Ohio St.

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338; *State v. Lynch*, 88 Ohio St. 71; *State v. Edwards*, 90 Ohio St. 305.

Until the adoption of this amendment the municipalities of the state, "in their public capacity, possessed such powers and such only as (were) expressly granted by statute and such as (were) implied as essential to carry into effect those which (were) expressly granted." *Ravenna v. Pennsylvania Co.* 45 Ohio St 118 [12 N. E. Rep. 445].

By the adoption of this amendment municipalities were empowered "to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws." That the ordinance under consideration is an exercise of local police power seems plain. Is it in conflict with the act of the general assembly of April 28, 1913, entitled "An act to provide an eight hour day on public work"? While the operation of this act was suspended until July 1, 1915, we shall assume for the purposes of this case that it embodied the law and the policy of the state on the subject to which it related from and after its passage.

By its terms the act of the general assembly was applicable to contracts only which were "let on and after July 1, 1915."

The provisions of the ordinance of the city were substantially similar to those of the state enactment, except that they became applicable to "all workmen engaged on any public work" from and after November 22, 1914. Thus the state denounced and penalized the act of employing workmen on public work for a longer period than eight hours in any one day or forty-eight hours in any one week, after July 1, 1915, while the city provided a penalty for the commission of a similar act prior to July 1, 1915.

But it is claimed that inasmuch as the statute was in effect from and after April 28, 1913, and that the policy of the state was declared therein, the ordinance penalizing such act committed prior to July 1, 1915, was in conflict with the general law and void.

The fallacy of this argument seems apparent. The case is not similar, as argued by counsel, to one wherein the congress

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of the United States, in the exercise of its exclusive power to legislate upon a subject, "manifests its purpose to call that power into effect and at once remove that subject from the sphere of state action." Here the power of the state is not exclusive. It is concurrent; the municipality being granted like power by the constitution "to adopt and enforce within its limits local police, sanitary and other similar regulations," subject only to the limitation that such regulations shall not be in conflict with state law.

Municipal police regulations, therefore, are valid unless inconsistent with state law; for it is only when they come in conflict with each other that the ordinance must yield to the paramount law. "Indeed," said Judge Cooley in his work on Constitutional Limitations, page 279, "an act may be a penal offense under the laws of the state and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of one would not preclude the enforcement of the other."

An ordinance or municipal by-law and a state law are not necessarily in conflict merely because they relate to the same subject. If they are consistent both may stand and the penalties imposed by both may be enforced. This seems to be the uniform holding.

In *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 261 [19 Am. Dec. 493], the court said:

"But it is said that the by-law of a town or corporation is void if the legislature has regulated the subject by law. If the legislature has passed a law regulating as to certain things in a city, I apprehend the corporation is not thereby restricted from making further regulations."

Perhaps it is not necessary to multiply cases on this subject, but a reference to two or three will probably not be amiss.

In the case of *Hong Shen, Ex parte*, 98 Cal. 681 [33 Pac. Rep. 799], the statute of the state of California provided that no opium should be sold until the seller had labelled the opium "poison" and had ascertained that the person purchasing knew its poisonous character and that it was to be used for a legiti-

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mate purpose. The city ordinance absolutely prohibited the sale except upon the prescription of a physician, yet the court held there was no conflict in the two regulations. In the opinion in the case the court said:

"While the regulation is different from that of the state there is no conflict, and therefore it is not in violation of the constitutional provision quoted above. There are the very best of reasons why cities should be authorized to impose penalties in addition to those inflicted by the laws of the state. Particular acts may be far more injurious, while the temptation to commit them may be much greater in a crowded city than in the state generally. They consequently require more severe measures for prevention. State laws are, of course, for the general good and cannot always answer the peculiar wants of particular localities."

*Hoffman, In re*, 155 Cal. 114 [99 Pac. Rep. 517; 132 Am. St. Rep. 75], the statute of the state provided a certain penalty for the adulteration of milk, and that all milk which did not conform to a certain standard should be deemed adulterated. The city of Los Angeles passed an ordinance fixing the standard much higher than that fixed by statute. The statute fixed the standard at 3 per cent of butter fat, while the ordinance fixed it at three and five-tenths per cent. It was insisted that the state having thus provided a standard for pure milk, the attempt of the city ordinance to vary this standard created a conflict in the law, with the necessary result that the ordinance must fall. In that case the court held in the syllabus that:

"The mere fact that the state, in the exercise of the police power, has established certain regulations by statute, does not prohibit a municipality from exacting additional requirements so long as there be no conflict between the two, and so long as the requirements of the municipal ordinances are not in themselves pernicious as being unreasonable and discriminatory both will stand, nor is it any objection to the validity of the ordinance than its regulatory provisions and the penalty for its violation differ from those of the state law."



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In the course of the opinion the court say :

"If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not, by ordinance, in the clear exercise of the police power, for the benefit of its citizens still further restrict the height of chimneys? Such, in principle, is the present case. The legislature has in effect declared that it shall be unlawful to sell milk containing less than eleven and five-tenths per cent solids, three per cent of which solids shall be milk fat. An ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state declaration merely is that milk shall not be sold containing less than eleven and five-tenths per cent of solids, three per cent of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per cent of milk fat than that exacted by the state law, there would be a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful, but what the city has in fact done has been to impose not fewer but additional qualifications upon the milk which may be vended to its consumers. The state, in its law, deals with all of its territory and all of its people. The exactions which it prescribes operate, (except in municipal affairs) upon the people of the state, urban and rural, but it may often and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the regulation here questioned."

A similar question arose in *Bellingham v. Cissna*, 44 Wash. 397 [87 Pac. Rep. 481]. There the charter of the city granted to the city of Bellingham full power to regulate and control the use of its streets. A state law was passed making it a

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misdeemeanor to drive an automobile in the streets of any city faster than twelve miles an hour. Later the city of Bellingham passed an ordinance fixing the maximum speed at which a machine could be driven, in the same parts of the city, at six miles per hour. It was insisted that the ordinance must fall because in conflict with the state law, but the court decided upon the soundest principles that there was no conflict and that it was competent for the authorities of Bellingham to prescribe a rate of speed less than that which the state law permitted.

The plaintiff in error was a member of the firm of Casey & Company, a partnership, which entered into a contract with the city on April 30, 1914, for the construction of a part of the filtration plant at the Division Street Pumping Station. This was prior to the adoption of the ordinance but subsequent to the adoption of the city charter. It is claimed that the passage of the ordinance impaired the obligation of his contract and that it is inapplicable thereto.

Without regard to the provision of the contract "that the contractor agrees that he will comply with the provisions of the labor laws of the city of Cleveland and the state of Ohio, particularly as outlined in Sec. 196 of the city charter," we think it is a sufficient answer to this claim to state that the police power granted by the constitution to the municipalities of the state is a power which may not be alienated or surrendered by contract or otherwise. *Butcher's Union Slaughter House Co. v. Live-Stock Landing Co.* 111 U. S. 746 [4 Sup. Ct. Rep. 652; 28 L. Ed. 585].

After a careful review of the record we find no error therein, and the judgment is affirmed.

Grant and Carpenter, JJ., concur.

Miller v. Miller.

## APPEAL—EXECUTORS AND ADMINISTRATORS.

[Darke (2nd) Court of Appeals, May 1, 1914.]

Allread, Ferneding and Kunkle, JJ.

IDA F. MILLER v. JOHN W. MILLER, ADMR.

**Order of Probate Court of Appointment of Administrator in Place of Unsuitable Executor Named in Will not Subject to Vacation by Appeal.**

An order by the probate court, a finding that the person designated in the will is not a suitable person to administer the estate, appointing as administrator of the estate of a decedent a person other than the one named in the will, is not subject to review by appeal.

ERROR.

*Martin B. Trainor*, for plaintiff in error.

*D. W. Bowman* and *John F. Maher*, for defendant in error.

### FERNEDING, J.

We have been favored in the consideration of this case by exhaustive briefs of counsel on both sides, which have been of valued service to the court in the conclusions arrived at.

The one question for solution presented seems to be whether or not an order of the probate court appointing one, not the party designated by the will as the administrator of the estate, is subject to review by appeal.

Michael Miller of this county died, leaving a last will duly probated, item 4 of which provides: "I do hereby nominate and appoint my trusty daughter, Ida F. Miller, my executrix of this my last will and testament," etc. The probate court appointed her brother, John W. Miller, administrator with the will annexed of the estate of Michael Miller, deceased, a certified copy of the journal entry from the probate court pertaining to said appointment being as follows:

"This day this cause came on to be heard upon the application of Ida F. Miller, to be appointed executrix of the es-

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tate of said Michael Miller, deceased, upon the evidence and argument of counsel, and the court being fully advised in the premises do find that said applicant is not a suitable person to administer said estate, and do find that John W. Miller is a suitable person to act as such administrator, etc. Therefore the court do hereby appoint said John W. Miller administrator with the will annexed of the estate of Michael Miller, deceased.

"Thereupon came said administrator, etc., and filed herein his application for such appointment and also presented herein his bond as such administrator, etc., in the sum of \$32,000.00 with John Gilfillan, R. G. Howell, A. Z. Bruss and O. P. Wolverton as sureties thereon according to law. And this bond is approved by the court and ordered made a matter of record of this court, as required by law and letters are issued accordingly."

Section 10605 G. C. provides:

"The probate court shall issue letters testamentary thereon to the executor if any be named therein if he is legally competent."

Counsel for Ida F. Miller in his brief asserts that this provision of the statute is "mandatory," unless the executor named in the will is legally incompetent. We have no quarrel with this general view, but it is manifest from a consideration of the journal entry that the probate court, for reasons satisfactory to himself, and presumably upon the evidence found that Mrs. Miller was not legally competent. Whether this judgment of the probate court is well founded or not can only be determined by a reviewing court in a case properly brought before such reviewing court where the evidence can be reviewed.

Mrs. Miller sought to bring the case to the common pleas court by an appeal. The court of common pleas upon motion, dismissed the appeal. From this ruling and judgment of the court of common pleas the case is brought to this court for review on error. The only question, therefore, for our consideration is whether the court of common pleas was justified in dismissing the appeal.

Counsel for the appellant rely upon the clause in Sec.

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11206 G. C., providing for appeals, from an order removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by the probate court.

The order of the probate court from which the appeal was attempted involves an original appointment, and not a removal or a refusal to remove. Counsel for appellant also relies upon Sec. 10859 G. C., which provides:

"From any order, judgment, or decree of the probate court, an appeal may be taken to the court of common pleas, by any person against whom it is made, or who is affected thereby, in the manner provided in other cases. Bills of exception may be taken and allowed upon any decision of the probate common pleas or circuit court, in such proceedings as in other cases."

We think it has been sufficiently established that Sec. 10859 G. C. is limited to proceedings affecting orders of distribution and cannot be made to apply to orders affecting original appointments of executors and administrators where the discretion of the original court is involved. Citing *Barr v. Closterman*, 1 Circ. Dec. 546 (2 R. 390); affirmed, no op., *Closterman v. Barr*, 27 Bull. 392; *Kislingbery v. Donovan*, 11 Dec. 535, 542 (8 N. P. 476); *Kraner, In re*, 19 Dec. 444 (8 N. S. 218); *Ebersole v. Schiller*, 50 Ohio St. 701 [35 N. E. Rep. 793].

It is contended on behalf of the appellant that Sec. 11206 G. C. should be liberally construed according to its spirit and reason, and to include cases of original appointment where the court declines to appoint the person or persons named in the will. Referring to the decisions upon this subject, we find that the courts have construed the statute in respect to appeals from the probate court to the common pleas court, strictly, rather than liberally. This policy is stated by Okey, J., in *Brigel v. Starbuck*, 34 Ohio St. 280, 287:

"An examination of our legislation and decisions shows that it has been the general policy in this state not to permit an appeal from an order appointing or removing a trustee, and that this extends to guardians, executors and administrators.

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In some states the rule is different. (Citing authorities.) The exception as to an appeal from the appointment of a guardian for a lunatic or an idiot, made, doubtless, by reason of the gravity of the proceeding and its effect upon the person, estate, and family of the ward, tends to prove the general rule in this state, and would seem to require that those who assert other exceptions should be able to point out some provision in terms warranting the appeal."

In the case of *Browne v. Wallace*, 66 Ohio St. 57 [63 N. E. Rep. 588], it was held in an appeal under Sec. 11206 G. C., that:

"As the right of appeal exists only by virtue of the statutes, in order to give the appellate court jurisdiction, the statutory provisions must be strictly followed."

In the case of *Collins v. Millen*, 57 Ohio St. 289, 298 [48 N. E. Rep. 1097], Judge Bradbury, speaking for the court, says, at page 291:

"The right of appeal is statutory, and we must look to the statutes to ascertain if it has been lawfully exercised. The party who seeks to exercise this right, must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment."

This policy of construction of statutes in regard to appeals was evidently in the mind of the general assembly in the enactment of Sec. 11206 G. C., for it was expressly provided that appeals may be taken "in proceedings to appoint guardians or trustees for idiots, lunatics, imbeciles or drunkards."

Under the well-known maxim, "*expressio unius est exclusio alterius*" the legislature having expressly conferred the right of appeal in the cases specifically mentioned in the statute, there follows a reasonable inference that appeals were not to be allowed in other cases of original appointments. This construction is also in harmony with sound public policy. If appeals were to be allowed from cases of original appointments, it would often leave estates without any one in charge of the assets while the appointment was being litigated. The dictum of the Supreme Court in the case of *Union Sav. Bank v. Tele-*

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*graph Co.* 79 Ohio St. 89, 100 [86 N. E. Rep. 478; 128 Am. St. Rep. 675], to the effect that, "The defendant if it had such an interest in the estate as would give it the legal standing to do so, might have attacked the appointment in the probate court, or by appeal or error," should be construed with the facts of that case.

It was not evidently intended to overrule the cases above cited nor to establish the right of an appeal direct from the original appointment. The court evidently had in mind an appeal from the final judgment upon an application to remove an administrator who had been improperly appointed. The case of *Schumacher v. McCallip*, 69 Ohio St. 500 [69 N. E. Rep. 986], did not involve an appeal from the probate court and is, therefore, not authority on this subject.

The opinion expressed by Judge Ferris, in *Oskamp, In re*, 5 Dec. 584 (7 N. P. 665), is one of discretion for the probate court. In the case cited in this report the court appointed the party named in the will, and then later removed him. This may be a very proper course in ordinary cases, but we cannot apply that rule in a reviewing court, unless the case is properly before such court with all the evidence bearing upon the propriety of such appointment. For aught we know, and we have nothing before us either in support of or adverse to the proposition, the probate court may have had good ground for the judgment rendered.

Whether proceedings in error in the common pleas court would be available is not involved in the present litigation and we, therefore, express no opinion in respect thereto.

The appeal was properly dismissed by the court of common pleas, and its judgment will, therefore, be affirmed by this court.

**Allread and Kunkle, JJ., concur.**

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## AUTOMOBILES.

[Hamilton (1st) Court of Appeals, July 24, 1914.]

Swing, Jones and Jones, JJ.

\*JOHN C. ROTH PACKING CO. v. FLOYD C. WILLIAMS, ADMR.

Owner of Automobile Killing Person on Sidewalk Liable for Failure to Keep it in Safe Place.

An owner of an electric truck, leaving it for the night standing on a concrete floor slanting toward and abutting a sidewalk, and with the brake on and controller removed, is liable for the death of a boy who, while he was walking along the sidewalk, was run over and killed by the truck which was started by some unknown agency.

*Aaron A. Ferris and Thomas H. Morrow*, for plaintiff in error.

*Littleford, James, Ballard & Frost*, for defendant in error.

## SWING, P. J.

This is an action in this court on error to a judgment of the court of common pleas, in which said court Floyd C. Williams, administrator, recovered a judgment in the sum of \$5,000 for the wrongful death of Roy Eyer.

Numerous errors are alleged in the petition in error but only one was urged upon the argument of the case and in the brief submitted. This alleged error is that the judgment is not sustained by the evidence.

In the petition, after setting out the appointment of the plaintiff as administrator of the estate of the deceased and the allegation of the corporate capacity of the defendant, the plaintiff alleged that the building of the defendant is so constructed that instead of a continuous front wall along the entire length, there is an open space about fifty feet in length and extending to the height of the first floor; that the second and upper floors immediately above said space are supported on three pillars which are located on a line with the front wall at a distance of about twenty-three feet apart, and that this open space ex-

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\*Affirmed, no op., *Roth Packing Co. v. Williams*, 91 O. S. 000; 60 Bull. 232.



## Roth Packing Co. v. Williams.

tends back from the sidewalk and front wall of the house a distance of about twenty-eight feet; that the floor of said open space is covered with concrete which slopes towards the street; and that on June 14, 1911, said open space was temporarily used for the storage of automobile trucks belonging to the defendant company; that on or about June 14, 1911, said Roy Eyer, deceased, was lawfully on the sidewalk on the north side of Gest street, walking east; that when said decedent arrived at the point in the sidewalk immediately in front of the open space above referred to, an automobile belonging to the defendant company, without any signal or warning, and without any person guiding or controlling it, rushed out of said open space in which it had been temporarily stored, down upon plaintiff's decedent, and before he could get out of the way, knocked him down and crushed him under its wheels, causing a fracture of the skull and internal injuries from which he subsequently died. Plaintiff further says that said death of the decedent was directly due to the position and condition in which said defendant company negligently left said automobile truck, and that decedent at the time was in the exercise of all due and proper care on his part.

Said defendant filed an answer admitting the appointment of plaintiff as administrator of said estate, and that the defendant is a corporation under the laws of Ohio; that it is the owner of the plant on the north side of Gest street and the open space in said premises as set out in the petition. Defendant further says that said open space was temporarily used for storing automobile trucks belonging to defendant company.

For a second defense, the defendant alleged that at the time of the accident and prior thereto and at the present time, it is in the business of buying, curing and selling at wholesale and retail, meats to be used for food for residents and citizens of Cincinnati and throughout a large portion of the United States; that in the conduct of its business it is the owner of and uses large and extensive buildings and storage warehouses situated on Oehler and Gest streets in said city, and in such business it owns and uses large trucks and vehicles operated by electricity as a motive power, and that each of said trucks

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weighs about 11,000 pounds; that the garage or storehouse where said trucks are usually stored and kept when not in use, is located on Oehler street; that on or about June 13, 1911, said Oehler street was being repaired by the city of Cincinnati, and by reason thereof defendant could not place or store its said trucks in said garage on Oehler street and was compelled to store its said trucks, for temporary purposes only, and in the night time, in said covered and open space belonging to the defendant, on Gest street, the space described in the first defense herein, and that it was necessary in the usual course of its business to charge with electricity the said trucks for a motive power for use in propelling said trucks on the day following, and so to charge them after the day's work was done, in the night time from the supply of electricity within the building on Gest street. And on June 13, 1911, about the hour of 8:30 o'clock in the evening of said day, one of the above trucks described, with other vehicles, had been placed in said open space, when the same truck, alleged in the petition to have run upon and caused the death of plaintiff's intestate, and had been charged with electricity, and the brake used on said truck had been set, and the controller on said truck used for turning on and into said truck the current of electricity for its propulsion had been disconnected so that said truck could not move or be put in motion without unlocking the brake thereon, and without connecting said controller with the electric current by some human agency; and said defendant, through its employees and agents, had used all means necessary and ordinarily used under like circumstances to place and keep said truck in a safe and secure position to the end that it could not be used or moved except by the agents or employees of the defendant in the line of defendant's business as aforesaid; that on the night of June 13, 1911, the night on which plaintiff's intestate met his death, a group of boys, ranging in age from about twelve to sixteen years, whose names except that of Roy Eyer are unknown to the defendant, the number of boys in said group being also unknown to the defendant, among them being plaintiff's intestate, Roy Eyer, who was a boy about twelve and a half years of age, none of whom were in the employ of the defendant or

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under the authority or agency of the defendant, at the hour named, while it was dark, against the repeated warnings of defendant or without notice to the defendant or its employees, one of said group of boys, or someone unknown to the defendant, got upon said truck, and in playing thereon, carelessly or wilfully, and without fault, knowledge or acquiescence of defendant or any of defendant's employees caused said controller to be connected with the electric current theretofore charged and stored in said truck as aforesaid, and thereby caused said truck to get in motion; and that while said plaintiff's intestate, Roy Eyer, was on the premises of defendant as a trespasser, and against the warning given theretofore by defendant and its employees, and without any fault on the part of the defendant, the truck so put in motion as aforesaid, and while said plaintiff's intestate was a trespasser on said premises, and solely through the carelessness and negligence of plaintiff's intestate, or through the fault or carelessness of some one unknown to defendant, none of whom were in the employ or acting under the authority of defendant, ran upon and caused the death of plaintiff's intestate.

Full time was given to counsel in the argument of the case orally, and able and elaborate briefs have been furnished us, and we have gone over the evidence very carefully, with the result that we are of the opinion that the judgment is sustained by the evidence. From the evidence the jury had a right to find, as they must have done, that Roy Eyer while walking along the sidewalk next to defendant's premises was suddenly struck by an automobile truck which darted out of the defendant's premises, and was killed by said truck. The jury were warranted by the evidence in finding that said Roy Eyer was in no way responsible for the truck leaving its position on the premises of the plaintiff in error and rushing upon him while he was walking along said sidewalk. The evidence does not clearly show the cause which produced the movement of the truck, but the fact remains that the truck was placed by the defendant in a place unguarded and open, and on a floor of cement slanting towards the sidewalk, in a position where it could be easily got at by persons passing along the street who

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would be inclined from any motive to interfere with it. While there is no direct evidence which shows that defendant's employees put said truck in motion, which resulted in the death of said Eyer, still it is equally clear that the defendant did not safely guard and place said truck in a safe and proper place, which seems to us, under the circumstances of this case, to show that the plaintiff's decedent met his death by reason of the negligence of the defendant in its not placing its truck in a safe and proper place so that it might not injure persons lawfully passing along said sidewalk.

Jones and Jones, JJ., concur.

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CIVIL SERVICE—OFFICERS.

[Hamilton (1st) Court of Appeals, October 17, 1914.]

Swing, Jones and Jones, JJ.

STATE EX REL. JOHN WEISS V. EDWARD S. KEEFER ET AL.

Subsequent Board Bound by Determination as to Eligibility for Promotion.

A municipal civil service commission having once determined that a member of the police force is eligible for promotion is without power, after promotion is duly made by competitive examination, subsequently to reverse its decision with respect thereto, and a subsequent board is bound by such former action.

MANDAMUS.

*Denis F. Cash, Alfred Bettman and Henry Hunt*, for relator.

*Walter M. Schoenle*, city solicitor, and *Charles A. Groom*, assist. city solicitor, for defendants.

JONES, O. B., J.

This is an action in mandamus brought by relator to order the defendants, as civil service commissioners, to certify in connection with the pay rolls of the police department that relator

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had been appointed and was during the period beginning August 1, 1912, and ending September 15, 1914, employed in pursuance of the act passed April 28, 1913, to regulate the civil service (as found in 103 O. L. 698), as a sergeant in the police department of the city of Cincinnati, such a certificate to be given under a requirement found in Sec. 21 of said act.

Defendants filed an answer in which they admit that the relator was duly appointed and acted as a corporal in the police department from August 1, 1912, till March 19, 1913, and that since the latter date he had been performing the duties of a sergeant in the police department, but they question the regularity and legality of his appointment, and ask for a dismissal of the petition.

There is no dispute as to the facts, between the parties, but defendants contend that because the relator had not, at the time he was examined for promotion, served two years in the department as a corporal, that he was ineligible for an examination at that time and was improperly placed upon the eligible list by the civil service commission and that therefore his appointment, which was then made by the director of public safety from the eligible list, was illegal.

Under the rules of the police department and civil service at that time promotions were made from the position of corporal to that of sergeant by appointment from an eligible list which was prepared by the civil service commission upon promotional examinations held by it. Such an examination was held on March 10, 1913, in pursuance of a resolution of the commission passed February 28, 1913, as follows:

"The chief of police has made a verbal request that all corporals in the police department at the present time be admitted to the competitive examination for sergeancy, as only three corporals are now in the service who are eligible under the rules. Safety Director Cash had made requisition for certification for appointment to the position of sergeant, and there is no eligible list.

"The secretary was directed to hold the promotional examination for this grade as soon as possible and notify all corporals that they are eligible for the examination."

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This resolution was adopted without dissent, at the meeting, by the three commissioners who at that time made up the civil service commission.

At that time one of the rules and regulations which had been adopted by said civil service commission was rule 84:

"No corporal who has not had at least two years' service as corporal in the police force of the city of Cincinnati shall be permitted to take an examination for promotion to the position of sergeant."

These rules also contained rule No. 110, as follows:

"No amendment of these rules shall be made, nor shall any rule be repealed, nor any new rule adopted at the same meeting at which it is proposed, and no final action to amend, repeal or supplement these rules shall be taken in less than seven days after its proposal and until after a public hearing, of which the commission shall give notice in at least two newspapers of general circulation in Cincinnati."

The sections of the civil service law in existence in March, 1913, providing for this promotional examination, which it is necessary to consider in this case, are Secs. 4480, 4481, 4482, 4483 and 4486 G. C., and under their provisions the commission was given full power to prepare rules and regulations to provide for the "grading of offices and positions similar in character in groups and divisions, so as to permit the filling of offices and positions in the higher grades as far as practicable through promotions." In pursuance of this power the commission had provided, by rule 84, that no corporal who had served less than two years as such should be eligible for examination for sergeant. There is, however, no statutory requirement as to the length of time a corporal should serve as such before being eligible for examination for sergeant.

From the action taken by the commission on February 28, 1913, it appears that at that time there were but three corporals then in the service who had been there the necessary two years to make them eligible for certification to the position of sergeant, and that there was then no eligible list. As under Sec. 4481, it was the duty of the commission, upon being notified by the safety director of a vacancy to be filled in the position of

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sergeant, to certify to him the three candidates graded highest on such an eligible list, it is apparent that if the rule requiring two years' service as corporal had not been waived or suspended, only three corporals could have taken the examination and if all three had successfully passed such an examination there would have been but three names to be certified on the eligible list for the making of one appointment as sergeant. The evidence shows that more than one sergeant was to be appointed at that time—the relator himself being the second appointment made under that examination—and it is therefore clear that as a matter of convenience it was then desirable for the commission to waive or suspend that rule if they had the power. No formal amendment or change in rule 84 was made at that time by the commissioners and no steps were taken to that end as provided by rule 110, but the action taken by the commission in its proceedings of February 28, 1913, in providing for the holding of the promotional examination for sergeants while not constituting an amendment or change of its standing rules, was, in effect, a suspension or waiver of the provisions of rule 84.

We are of the opinion that the civil service commission had the power to so waive or suspend this rule, and that its action in making all the corporals then on the force eligible to this examination was within its power, and that the examination was within its power, and that the examination was held according to law. Nor was it necessary to note on its minutes that a rule had been suspended, there being no objection on the part of any member and all members being present. *Cushing*, Law of Leg. Assemb. Secs. 794 and 1478; *Wyman*, Admin. Law 108; *State v. Board of Education*, 1 Circ. Dec. 614 (2 R. 510); *Greeley v. Hamman*, 17 Colo. 30[28 Pac. Rep. 460].

The record shows that the statute was complied with in all particulars with regard to the examination which relator passed, and in making of his appointment. Upon a requisition made by the director of public safety for an eligible list, Weiss was duly certified upon that eligible list by the civil service commission itself, and he was duly appointed by the director of public safety, and the commission was notified of his appointment by the director of public safety, and Weiss' name

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was then placed upon the official roster of the commission kept in pursuance of Sec. 4483 G. C., and has been so continued up to the time it is now questioned.

The civil service commission having been invested by law with the power to determine the eligibility of Weiss, and having determined him to be eligible, is without power to subsequently reverse its decision. *Lazenby v. Civil Service Commission*, 116 App. Div. 135 [101 N. Y. Supp. 5]; affirmed, *Lazenby v. Homer*, 188 N. Y. 588 [81 N. E. Rep. 1172]; *People v. Cobb*, 13 App. Div. 56 [43 N. Y. Supp. 120]; *People v. Preston*, 62 Hun. 185 [16 N. Y. Supp. 488]; affirmed, *People v. Myers*, 131 N. Y. 644 [30 N. E. Rep. 864].

In 29 Cyc. 1433:

"If the power has by law been given to any officer to determine a question of fact, his determination is final, provided he has not been guilty of an abuse of discretion. Such a determination is binding upon the successors in office of the officer who made it."

Justice Brown, in the opinion of the court in *Noble v. Railway*, 147 U. S. 165 [13 Sup. Ct. Rep. 271; 37 L. Ed. 123], discusses the power of an officer acting in a quasi judicial capacity to reverse the decision of his predecessor in the same office.

In the case of *Ptacak v. People*, 194 Ill. 125 [62 N. E. Rep. 530], which is relied upon by defendants, the title of the assistant superintendent of police in Chicago was attacked directly by *quo warranto*, the statute requiring the promotional examination to be limited to members of the next lower rank; the officer whose title was attacked was not a member of the next lower rank, and was therefore rendered by statute ineligible to examination, and was held to have been illegally appointed. This case can not apply to the case at bar, as it was there not a mere waiver of rule on the part of the commission, but a violation of the statute.

If it was desired to raise the question of the regularity or legality of his appointment, Sec. 29 of the act furnishes an opportunity for a direct attack upon his title, and it would be conducive to a stronger feeling of reliance upon the stability of their tenure by civil service employees, to have any question



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raised as to their titles by such a proceeding, rather than by a refusal of the civil service commission to certify on the pay roll names that have been placed and so long maintained by them upon their official roster.

The name of the relator being properly upon the roster, and his employment as sergeant having been made in pursuance of law, it was the duty of the civil service commission to furnish the certificate required under Sec. 21 of the civil service act.

A writ of mandamus, as prayed for, will therefore be allowed.

**Jones, E. H., J. concurs.**

**Swing, J.**

Judge Swing concurs in the above decision, for the reason that the civil service commission having been invested by law with the power to determine the eligibility of Weiss, and having determined him to be eligible, it is without power subsequently to reverse its decision, and the present board is bound by this former action.

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**ASSAULT—CRIMINAL LAW.**

[Lucas (6th) Circuit Court, November 16, 1912.]

**Wildman, Kinkade and Richards, JJ.**

**W. D. CROMLEY V. STATE OF OHIO.**

**1. Omitting Material Element in Stating Law to Jury Erroneous though Correctly Stated in Earlier Proposition.**

It is reversible error to state a proposition of law incorrectly in the charge to the jury by leaving out one material element, notwithstanding the same proposition was correctly stated in an earlier part of the charge.

**2. Authorizing Verdict upon Assault with Dangerous Instrument Erroneous if Count Makes no Such Charge.**

It is also error to so charge the jury as to authorize them to return a verdict of guilty "under the third count of the indictment if they should find simply that the defendant made the assault with a dangerous instrument," when the third count of the indictment contained no charge of assault made with a dangerous instrument.

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**3. Abiding Conviction of Defendant's Guilt not Sufficient to Satisfy Mind Beyond Reasonable Doubt.**

To charge a jury that "if you can say that you have an abiding conviction of defendant's guilt, then you are satisfied beyond a reasonable doubt," is error for the reason that the statement does not contain all the requirements as to the degree of evidence necessary to satisfy the mind beyond a reasonable doubt.

[Syllabus by the court.]

**ERROR.**

*C. W. Meck, Byron F. Ritchie and Ralph Emery*, for plaintiff in error.

*H. C. Webster*, Pros. Atty., and *A. F. Connolly*, for defendant in error.

**RICHARDS, J.**

The plaintiff in error was indicted at the September term, 1911, the indictment containing three counts. The first count charged him with an assault with intent to kill one Rezin Orr; the second count with intent to wound said Rezin Orr, and the third count contained a charge of mayhem committed on said Rezin Orr.

The prosecuting attorney on the trial in the court of common pleas elected to proceed upon the first and third counts and the jury returned a verdict of guilty on the third count contained in the indictment. Upon that verdict the defendant was sentenced to the penitentiary.

Numerous errors are assigned in this court for which it is contended the judgment of the court below should be reversed. Among other errors insisted upon by counsel are those relating to the charge of the court as given to the jury. During the course of the charge the trial judge properly stated to the jury the essential elements constituting the crime of mayhem as charged in the third count in the indictment, and among others, that before the jury returned a verdict of guilty under that count, they must find from the evidence, beyond a reasonable doubt, that the left eye of the complaining witness, Rezin Orr, was destroyed or put out as a result of the claimed assault. Elsewhere in the charge the trial judge again recurs to the

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elements necessary to constitute this crime and undertakes to restate them, and in this restatement he omits the requirement that the burden rests upon the state in order to justify a conviction under the third count to satisfy the jury beyond a reasonable doubt that an eye of said Rezin Orr was destroyed or put out. The court in the concluding portion of this restatement says to the jury, "Unless you find, and before you can find a verdict against the defendant on this count in the indictment, you must find these facts established to your satisfaction beyond a reasonable doubt by the evidence." By so stating, the trial judge thus emphasized the essential facts as just recited by him, which recital omitted the fact already stated. In view of this state of the charge, the jury may have concluded that it was unnecessary, in order to justify a conviction under the third count in the indictment, that they should find that an eye of the complaining witnesses had been destroyed or put out.

The indictment is returned under Sec. 12416 G. C., which requires that before the defendant can justly be convicted of the particular offense set forth in the third count of the indictment, the eye must be put out or destroyed. The evidence in the case was of such character that it became important for the jury to determine, as one of the essential elements of the crime, the averment contained in the indictment which was omitted in the restatement made by the trial judge.

I call attention to two cases which shed light upon the question under consideration: *Northern Ohio Ry. v. Rigby*, 69 Ohio St. 184, 191 [68 N. E. Rep. 1046]; *Cincinnati, H. & D. Ry. v. Frye*, 80 Ohio St. 289, 298 [88 N. E. Rep. 642; 131 Am. St. Rep. 709].

In each of these cases the correct proposition of law had been given to the jury in charge, but elsewhere in the charge the law was improperly stated. Under that state of the case the Supreme Court say on page 298 of the case last cited that it is impossible for the court to determine which of the instructions the jury followed, and that the court can not assume that the jury selected the one statement which was substantially correct and rejected the other statements which were erroneous,

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and that under such circumstances the rule that error without prejudice is not ground for reversal can have no application.

We conclude that the charge is erroneous in thus restating the elements and leaving out one material element of the offense as contained in this charge.

The court further charging the jury gives this proposition:

"Before they can find the defendant guilty under the third count of this indictment, they must be satisfied beyond a reasonable doubt from the evidence that the defendant, if he did make this assault, made it with the malicious intent to maim or disfigure the said Rezin Orr, or that he made it with a dangerous instrument,—that he did make the assault with a dangerous instrument."

The language is subject to the infirmity of the earlier part of the charge to which reference has been made, and also to the further objection that it apparently authorized the jury to return a verdict of guilty under the third count of the indictment if they should find simply that defendant made the assault with a dangerous instrument, whereas the third count of the indictment contains no charge of an assault made with a dangerous instrument, and we therefore hold that this proposition of law in view of the language in the indictment is erroneous.

The court in defining reasonable doubt uses some language, doubtless inadvertently, to which we think it important that attention should be called. He said to the jury "This doubt should not be speculative or imaginative nor be based on conjecture or fancies; it arises, or may arise from that state of the proof which, after you have considered and compared all the evidence, and having in mind the presumption of defendant's innocence, leaves your minds in that condition that you can say that you have an abiding conviction to a moral certainty of defendant's guilt." By omitting the word "not" after the word "can" and in front of the word "say," the court states to the jury the opposite of the proposition which he doubtless intended to give in the charge. The charge should have stated in substance that under the circumstances stated the doubt would arise if the minds of the jury were left in such condi-

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tion that they could not say they had an abiding conviction to a moral certainty of defendant's guilt. The language used by the court is, with the correction suggested, substantially the same as was used in the charge as found in *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 [52 Am. Dec. 711], cited with approval in *Morgan v. State*, 48 Ohio St. 371 [27 N. E. Rep. 710]. See also *Clark v. State*, 12 Ohio 483 [40 Am. Dec. 481].

The trial judge stated to the jury further as follows: "If you can say that you have an abiding conviction of defendant's guilt, then you are satisfied beyond a reasonable doubt." This statement contained in two lines in effect justifies a verdict of guilty so far as the degree of evidence is concerned if the jury have an abiding conviction of the defendant's guilt. We think the language is not sufficiently clear and does not contain all the requirements relating to the degree of evidence that are necessary in defining a reasonable doubt.

The verdict returned by the jury in this case specifically finds the defendant guilty as charged in the third count of the indictment, without making any reference to the first count. The case was submitted to the jury upon both the first and third counts and proper practice would require that the verdict should respond to the issues made on both the first and third counts of the indictment. *Wilson v. State*, 20 Ohio 26; *Jackson v. State*, 39 Ohio St. 37.

We have examined the evidence contained in the bill but as the case will have to be reversed and remanded for a new trial, we refrain from passing upon the weight of the evidence.

Judgment reversed and cause remanded for a new trial.

Wildman and Kinkade, JJ., concur.

Richland County Circuit.

### NEGLIGENCE—TRIAL.

[Richland (5th) Circuit Court, January, 1913.]

Taggart, Voorhees and Shields, JJ.

\*J. P. ARRAS, ADMR. V. BALTIMORE & O. RY.

**Question of Contributory Negligence Becomes One for the Court after Showing of Danger Warning to Decedent.**

The testimony indicating that the decedent had warning of his danger in time to have saved himself, the question of his contributory negligence becomes one for the court, and as such not to be submitted to the jury; hence there was therefore no error in directing a verdict for the defendant.

[Syllabus by the court.]

**ERROR.**

*W. J. Bissman and W. S. Kerr*, for plaintiff in error.

*McBride & Wolfe*, for defendant in error.

### PER CURIAM.

This was an action in the court of common pleas to recover damages for the wrongful death of one Adam Arras, charged to have been caused by reason of the negligent acts of the defendant in error.

The averments of the petition are that the defendant owns, operates and controls a track leading from the main line of its road to and among the shops of the Barnes Manufacturing Co. near the city of Mansfield, in Richland county, Ohio, and that said track was so used by the defendant for the accommodation of said Barnes Manufacturing Co. in shipping its products; that said track was so located that the employees of the manufacturing company were compelled, in the performance of their duties, to pass over said track, and for that purpose they had established a regular place for crossing the same; that said crossing has long existed and was well known to the defendant, its agents and servants; that the time of moving cars upon said track is unfixed and is at the discretion of said company, and that the said decedent, Adam Arras, had no knowledge or notice

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\*Affirmed, no op., *Arras v. Railway*, 89 O. S. 420.

**Arras v. Railway.**

thereof; that the advance of the cars, by reason of the noise of the factory, can not be heard separate and apart from the other noise of the factory, all of which had a tendency to render said track extremely dangerous; that, by reason of such dangerous condition, the defendant had caused a flagman or watchman to be stationed at said crossing, at the time of moving cars, to give notice to the employees of said Barnes Manufacturing Co. and to notify and warn them of danger, and that the defendant relied upon such notice being given.

It further recites that on or about June 1, 1910, the said Adam Arras was pulling a large truck along the passage way leading to and over the said crossing above specified; that the approach to said crossing was obstructed by buildings and that the crossing itself was left unguarded by defendant at that time, and no one placed by it to give warning of the approach of cars, and with no one on the front of the moving cars along said track to give warning to persons who had occasion to cross said track at said crossing; and without notice, knowledge or warning, and while exercising care on his part, and without negligence on his part, he entered on said crossing and was struck by a box car that was being pushed by an engine that was owned and controlled by the defendant and operated by the defendant, its agents and servants, and received injuries by reason of such collision which caused his death and which occurred on the day last mentioned.

The case was submitted to the jury upon the evidence of the plaintiff and at the close of plaintiff's testimony. the court on motion directed the jury to return a verdict for said defendant. It is this action of the court in directing a verdict for the defendant that is complained of in the petition in error filed in this court to review the proceedings of the court of common pleas.

It is claimed by the defendant that the said Adam Arras was guilty of negligence contributing to his own injury and that by reason of such contributory negligence, the plaintiff would not be entitled to recover in this action.

The testimony discloses that, just prior to the accident, a foundry foreman of the Barnes Manufacturing Co. passed the

## Richland County Circuit.

decident, Adam Arras, who was then pulling a large truck towards the track of the railroad company, which truck was being pushed from behind by one Rudolph; that Rogers, the foreman, when he reached the middle of the railroad track, saw for the first time that the cars were being backed along the track from the south and towards the crossing, and immediately turned and gave warning to the decedent, throwing up his hands and saying to him "Go back," and at the same time he almost immediately turned and stepped across the track, supposing that the decedent was in a place of safety.

The foreman further testifies that, when he was in the middle of the track, the decedent, Adam Arras, was from six to eight feet behind him when the warning was given, and that, supposing that he would protect himself and make himself safe, he himself crossed the track to the west side and the cars backed between him and the decedent and the other party who was pushing the truck. After the car had passed about half the length of itself, he heard a crash and learned that the decedent had been struck.

The court is of the opinion, from the testimony of the witness Rogers, that the decedent had warning in sufficient time to have saved himself from collision with the moving cars; that the car was about thirty feet to the south when the warning was given, as shown by the evidence, and that he could have saved himself from injury; and that, as a matter of law, he was guilty of contributory negligence in proceeding toward the track after the warning had been received, and in coming in collision with the moving cars, by reason of which he was injured.

The court is of the opinion that whether or not the decedent was guilty of contributory negligence is not a question of fact to be submitted to the jury but is a question of law to be determined by the court; and that, for this reason, the action of the court in sustaining a motion to direct a verdict was proper and was not error. The judgment of the court of common pleas is affirmed with exceptions.



**State v. Keefer.****CIVIL SERVICE—OFFICERS.**

[Hamilton (1st) Court of Appeals, October 24, 1914.]

Swing, Jones and Jones, JJ.

(Swing, J., not sitting.)

STATE EX REL. EDWARD MUGAVIN ET AL. V. EDWARD S. KEEFER  
ET AL.

**Valve-Man Being Unskilled Laborer Becomes "Incumbent of the Place" under Present Act and Entitled to Remain on Passing Non-competitive Examination.**

A valve-man employed in the municipal service under the former civil service law being in the unskilled class, his appointment by the director of public service was legal and he becomes an "incumbent of the place" under the present act; and as such is entitled to remain in the position and to receive pay for his services, subject to his successfully passing a non-competitive examination when called upon to do so by the commission.

**ERROR.**

*Nelson & Hickenlooper*, for plaintiffs in error.

*Walter M. Schoenle*, city solicitor, and *Chas. A. Groom*, assist. city solicitor, for defendant in error.

**JONES, E. H., J.**

This is an action which involves the construction of the so-called civil service act passed by the eightieth general assembly of the state of Ohio and found in 103 O. L. 698. The action is one for mandamus, the prayer being, in effect, that the defendant civil service commission for the city of Cincinnati be required by the court to certify to the pay roll containing the names of relators, under Sec. 21 of said act.

The facts with regard to the two relators are not identical. It is conceded that the recent decision of this court in *Keefer v. State*, 37 O.C.C.77 (20 N.S.474), disposes of the questions raised on behalf of the relator, Wm. S. Boyd. We find, from an examination of the record, that such is the case, and a peremptory

## Hamilton County Appeals.

writ will issue in favor of Mr. Boyd on the authority of the case above referred to.

Edward Mugavin was appointed, or employed, by the director of public service as a valve-man, under a former civil service law which was repealed by the enactment of the present law. Under the former law "unskilled laborers" were not in the classified service. The rules adopted by the civil service commission under that law classed valve-men as unskilled laborers and not falling within the provisions of the civil service act. It is contended that this classification is incorrect and that the duties of valve-men are such as to require skill and experience, and that valve-men should be classified and are not within the purview of the word "unskilled." It is further contended that if this view is correct, then the director of public service had no authority to appoint Mugavin to the position or place which he fills.

With this contention we can not agree. There is no dispute between counsel as to the duties of valve-men and as to the nature of the work which they are required to perform. Upon the agreed statement, in argument, or what these duties are, we are clearly of the opinion that the labor is such as is designated as "unskilled" by the civil service act in force at the time of Mugavin's appointment, said work requiring no special training, practical experience, or apprenticeship. Having reached this conclusion, it follows that his selection or appointment by the director of public service was legal, and that at the time of the taking effect of the act under consideration he was an "incumbent of the place" under the meaning of Sec. 10 of said act.

It is further contended that even if such be the case he is not now entitled to hold the position or to any compensation for labor performed in such position since August 8, of this year, for the reason that on said date the twelve months' period within which he would be subject to a noncompetitive examination had passed, and no examination has been taken by him. In this connection it is conceded that no such examination has been held by the civil service commission. It does not appear why this apparently liberal time has been allowed to pass

**State v. Keefer.**

without an examination but there is no intimation, nor indeed can there be any, that Mugavin or any other employee of the city is responsible for this delay.

We believe that the reasonable construction of the last paragraph of Sec. 10, which contains this limitation of twelve months, is to hold that should the commission for any reason delay the noncompetitive examination beyond the time prescribed, it must be held at the earliest time practicable, and that until such time the employees holding over as incumbents of "offices or places" at the time of the taking effect of the act, would continue to hold their places. If the examination is unreasonably or unnecessarily delayed by the commission, the proper remedy would be to proceed against the members in the way provided by statute for compelling officers to perform the duties imposed upon them by law.

Under the undisputed facts in this case as disclosed by the record, we find that the law supports the claim made by counsel for Mugavin, and that he is entitled to remain in his position and receive pay for services rendered, subject to his successfully passing a noncompetitive examination when called upon to do so by the commission.

The judgment will be reversed, and judgment given here for both of the relators, plaintiffs in error. Writ of mandamus to issue.

**Jones, O. B., J., concurs.**

## Guernsey County Appeals.

**CONVERSION—LIMITATIONS.**

[Guernsey (7th) Court of Appeals, April Term, 1914.]

Pollock, Metcalfe and Norris, JJ.

GILLESPIE &amp; McCULLEY v. JAMES HOLLAND ET AL.

**1. Assertion of Ownership by Party Wrongfully Taking Property not Prerequisite to Action for Conversion.**

It is not necessary for the party taking wrongful possession of personal property of another to assert absolute ownership of the property in order to give the owner, who is entitled to the immediate possession, the right to an action for conversion, but any unauthorized act which deprives the owner of the possession of his property, or the exercise of any dominion over the property inconsistent with his possession, is sufficient.

**2. Bar of Four Years' Limitation Runs from Accrual of Right of Action for Conversion.**

The statute of limitations begins to run at the time the right of action accrued, and an action for the conversion of personal property is barred within four years after that time.

[Syllabus by the court.]

**ERROR.***R. T. Scott*, for plaintiffs.*Rosemond, Bell & Dugan*, for defendants.**POLLOCK, J.**

The defendants in error brought an action in the court of common pleas of this county, in which they alleged that on or about the — day of October, 1908, the plaintiffs in error wrongfully converted to their own use certain articles of household furniture owned by the defendants in error.

The answer of the defendants below contained two defenses, but it is now only necessary to refer to the second defense, which was a plea of the statute of limitations, alleging that the cause of action did not accrue within four years prior to the bringing of the action.

The case went to trial to a court and jury, resulting in a verdict and judgment in favor of the plaintiffs below, and to reverse that judgment this action is prosecuted.

## Gillespie v. Holland.

The plaintiffs below had been residents of the city of Cambridge, and the defendants were engaged in the furniture business in that city. While the plaintiffs below were living in that city they purchased from defendants below some articles of furniture and failed to pay the entire purchase price, leaving unpaid \$25.85. Sometime after the purchase of this furniture plaintiffs below stored this and other furniture which they owned, in a room in the city, and moved to the state of Illinois. After plaintiffs below left the city the defendants below took this furniture from the room where plaintiffs had stored it, into their own possession and placed it in their storeroom. They had no lien on any of the furniture but only an account against plaintiffs below for the amount referred to above.

On January 22, 1907, after defendants below had taken possession of the furniture, they wrote to plaintiffs below stating that they had taken possession of their furniture, and that there was a balance due then of \$25.85, and one dollar storage, and that they were willing to sell sufficient of these goods to pay their claim, and to send plaintiffs below the balance of the goods.

After this the defendants below wrote plaintiffs below a number of letters saying that they would sell the furniture, and apply the amount received therefor to the payment of their claim, unless plaintiffs below paid the claim. The last letter was written on May 5, 1908, saying that if plaintiffs below did not promptly comply with this request that defendants below would take judgment and sell this property. In all these letters defendants below say that the furniture is the property of plaintiffs below, but they always asserted their intention to hold this property until the debt which plaintiffs below owed them was paid, and if their demand was not complied with they would sell the property. Plaintiffs below gave defendants below no right to take the property from the room in which it was stored to their storeroom. The defendants below retained possession of this furniture until some time after July 12, 1908, and then sold it.

At the close of the testimony the defendants below requested the court to give the jury in charge the following:

## Guernsey County Appeals.

"If you find that the defendants took unlawful possession of the personal property in the petition described, then the court says to you that the cause of action in favor of the plaintiffs accrued at the time of the taking, if plaintiffs then knew of the same, but if they did not know, then as soon as they discovered that the goods had been taken, and the party who had taken them."

This was refused by the court and exceptions noted. In the general charge the court said in substance that if defendants were holding these goods as goods of plaintiffs, then a cause of action would not accrue until after defendants sold such goods, and if that were after July 12, 1908, then the statute of limitations would not have run against the action, the petition having been filed July 12, 1912.

The only question to be determined by this court in this action is whether the cause of action accrued at the time defendants below took the furniture from the room in which it had been stored by plaintiffs below into their possession, and removed it to their storeroom, or at the time defendants sold this furniture.

The right to an action of conversion of personal property depends upon the wrongful possession by one party of the property of another. It is the wrongful taking of the property that gives the right of action to the owner of the property against a wrongdoer. The mere fact that the wrongdoer says, "I have taken possession of your property," does not relieve him from the action of conversion when he has wrongfully taken possession of the property and is asserting the right to retain that possession until some demands of his are complied with. It is not necessary for the party taking wrongful possession of property to assert absolute ownership of the property in order to give the owner of the property the right to an action for conversion. If the owner, entitled to the immediate possession of his property, has been deprived of that possession by the unauthorized act of another, or by the exercise of dominion over the property inconsistent with the right of possession of the owner, it is a conversion of the property.

"Any distinct act of dominion wrongfully exerted over

## Gillespie v. Holland.

one's property in denial of his right, or inconsistent with it, is a conversion. 'The action or trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right, amounts, in law, to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use.' While, therefore, it is a conversion where one takes the plaintiff's property and sells or otherwise disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right." Cooley, Torts \*p. 448.

Of the numerous cases sustaining the principle referred to above we will only cite the following: *Bristol v. Burt*, 7 Johns. (N. Y.) 254 [5 Am. Dec. 264]; *Thorp v. Robbins*, 68 Vt. 53 [33 Atl. Rep. 896]; *University of N. C. v. Bank*, 96 N. C. 280 [3 S. E. Rep. 359]; *Omaha, & G. S. & Ry. v. Tabor*, 13 Colo. 41 [21 Pac. Rep. 925; 5 L. R. A. 236; 16 Am. St. Rep. 185].

The defendants below took possession of these goods and removed them to their storeroom prior to July 22, 1907. They did this without the permission of the plaintiffs below. This act was a wrongful taking possession of these goods. It is true that they acknowledged the furniture to be the property of the plaintiffs, but they claimed the right to retain that possession until their account against the plaintiffs below was satisfied, and if not paid by plaintiffs below they claimed the right to sell this property, or sufficient of it, to pay their claim, and afterwards did sell the property.

It is claimed on the part of the plaintiffs in error that the right to an action of conversion did not accrue until the disposal of the property by them. The sale of this property by the defendants below did not affect the title of the plaintiffs below in the property in any way. They had title to the property at the time that it was wrongfully taken, and that title

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continued after the sale of the property, until they brought the action to recover damages for the wrongful conversion.

The defendants below had no right to take possession of the property, and they had no right to sell it after taking possession; but the act of the defendants below in selling the property did not in any way change the right of the owners to take possession of the property, or if they saw fit, to recover damages for its wrongful conversion.

"An action for either of the following causes shall be barred within four years after the cause thereof accrued—for the recovery of personal property, or for taking, detaining or injuring." Sec. 11224 G. C.

"The statute of limitations begins to run from the time the plaintiff's cause of action accrues, unless some recognized exception postpones its operation." 19 Am. & Eng. Enc. 193.

"Our attention has been called by the defendants in error to the case of *Glidden v. Bank*, 53 Ohio St. 588 [42 N. E. Rep. 995; 43 L. R. A. 737], as sustaining their position that the cause of action did not accrue until the sale. In that case the property had been pledged, and the pledgee sold the property to himself. All the court decides in that case is that the statute of limitations did not begin to run until the pledgee did some act that put it beyond his power to perform the conditions of the pledge. The difference between that case and the one we are now considering is that the pledgee in that case had the rightful possession of the property, and the statute did not begin to run until he violated the conditions of the pledge. In the case we are considering the defendants below never had rightful possession of the property, and the wrong was committed at the time they took possession of this furniture.

Our attention has been called by the defendants in error of *Sammis v. Sly*, 54 Ohio St. 511, 519 [44 N. E. Rep. 508; 56 Am. St. Rep. 731]. The only question the court is there discussing is when the title to property which has been wrongfully taken possession of by another passes from the rightful owner, and they hold that the mere intermeddling with another's property in a way to deny his title does not of itself divest his title, but that he may treat it as such by commencing an action for



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conversion. We do not think that this in any way affects the question now before us.

It follows that the right to maintain this action accrued at the time the goods were taken possession of by the defendants below, that it was error for the court to refuse the request to charge, and also error to charge as stated. Further, as there is no dispute in the evidence as to the time the furniture was taken possession of by the defendants below, the verdict is against the weight of the evidence.

The judgment of the court below is reversed and the case remanded for further proceedings.

**Metcalf and Norris, JJ., concur.**

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**CONTRACTS—ERROR—LIMITATIONS.**

[Hamilton- (1st) Court of Appeals, March 14, 1914.]

**Swing, Jones and Jones, JJ.**

**JOHN R. SAYLER, EXR. v. LUCY E. SELLERS.**

1. Action on Agreement to Make Testamentary Provision for Compensation for Services in Caring for an Aged Couple Barred by Statute.

An action does not lie on an agreement to make testamentary provision for compensation for services in caring for the decedent and his wife in their old age, where the suit to enforce the agreement was not filed for more than two years after the appointment of the executor and more than six months after the rejection of the claim by the executor.

2. Judgment for Quantum Meruit Embodying Substantial Justice Sustained.

But where the court found on all the issues, including quantum meruit, for plaintiff and rendered judgment in an amount which embodied substantial justice based upon conclusions which were substantially correct, a reviewing court will not set the judgment aside on the ground that the court erred in a matter of law or logic.

[Syllabus by the court.]

**ERROR.**

*Peck, Shaffer & Peck and Sayler & Sayler, for plaintiff in error.*

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*Healy, Ferris & McAvoy*, for defendant in error.

JONES, E. H., J.

The amended petition filed by the plaintiff, Lucy E. Sellers, in the court below concluded with an alternative prayer for one of three different orders or judgments: first, for an order compelling the defendant executor to deliver to her one hundred and fifty shares of the capital stock of the First National Bank of Cincinnati; second, "if this relief can not by law be granted that she recover of defendant the sum of \$37,500 the value of said shares"; third, if such relief can not be granted that she recover from defendant the sum of \$28,921, being the value of her services less the amount received by her with interest from August 11, 1909. There were allegations in the amended petition upon which this alternative prayer was predicated.

Answers were filed by each of the defendants setting forth substantially the same defense to the amended petition of the plaintiff. The answers are long, containing eight separate defenses, which we will not take space to set out verbatim. The contents of the answer will sufficiently appear from the discussion which follows.

The prayer for delivery of the bank stock or judgment for the value thereof was based upon a written instrument signed by Mr. Van Wormer September 16, 1907, of which the following is a copy:

"SEPT. 16, 1907.

"In addition to the seven thousand dollars invested in 3 1-2 per cent Cin'ti viaduct bonds, one hundred dollars invested in a United States Government bond and sixty shares of Cin'ti Street Railway stock, I Asa Van Wormer, give and bequeath to Lucy E. Sellers for taking care of me and my home, at my death, one hundred and fifty shares of First National Bank stock. If Lucy E. Sellers should die before I do, then at my death the one hundred and fifty shares of First National Bank stock goes to her daughter Stella Sellers.

"(Signed) ASA VAN WORMER."

**Sayler v. Sellers.**

This was not witnessed, and although testamentary in form no claim is made that it should be treated as a codicil to testator's will. It is claimed, however, in the amended petition that, at the time of its execution, Mr. Van Wormer agreed to make a codicil to his will incorporating its provisions and bequeathing to Mrs. Sellers the bank stock therein mentioned. It is upon this alleged promise that the prayer for the delivery of the stock is based, the claim being that the executor since the death of Mr. Van Wormer has held said stock in trust for Mrs. Sellers.

The testator, Asa Van Wormer, died August 11, 1909. John R. Sayler, named as executor in the will, was appointed September 18, 1909. On September 22, 1910, Mrs. Sellers presented to said executor a claim for \$28,921 for labor performed and services rendered to Asa Van Wormer from April 13, 1897, until August 11, 1909. This claim was disallowed October 20, 1910, and on November 30, 1910, the original petition of Lucy E. Sellers, plaintiff below, was filed against said Sayler, executor, in which she sought to recover said sum of \$28,921, with interest from August 11, 1909.

The defendant below admitted in his amended answer the presentation and rejection of this claim. In his sixth defense he admits that plaintiff, Lucy E. Sellers, exhibited to him a paper purporting to be the original of said instrument of date September 16, 1907, set out above, and says that:

"Thereupon this defendant orally disputed and rejected the same, and said to the plaintiff that the instrument was of no validity, and refused to indorse thereon his allowance of it as a valid claim against the estate."

Further answering, he claims:

"That the said plaintiff failed to bring an action against this defendant on a cause of action growing out of a failure and neglect on the part of Asa Van Wormer to perform any agreement under or evidenced by said instrument with respect to one hundred and fifty shares of the First National Bank stock within six months thereafter.

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"That no other exhibition of said instrument or of a claim under said instrument was made to this defendant.

"Wherefore this defendant says that any claim growing out of or evidenced by said instrument is barred."

In the seventh defense the executor denies that said Asa Van Wormer agreed to make a will giving plaintiff at his death one hundred and fifty shares of stock of the First National Bank of Cincinnati, or that he agreed with the plaintiff that he would have a codicil to his will executed in due form, etc.

In the eighth defense the executor says that he was appointed September 18, 1909; that he caused notice of his appointment to be published in a newspaper of general circulation, commencing on September 19, 1909, as required by statute; that the said plaintiff failed to bring action against said defendant within two years, on a cause of action growing out of a failure and neglect on the part of Asa Van Wormer to perform an agreement, as set out in the petition.

We think these defenses as to the agreement to make a will or codicil giving Mrs. Sellers the bank stock are a bar to her recovery upon that claim, as it is conceded that the amended petition in which said claim was first sued upon was not filed until more than two years after the appointment of the executor and more than six months after the rejection of said claim by him; the court below was therefore not warranted in basing its judgment in favor of the plaintiff upon this alleged agreement.

The case was submitted below upon all the issues joined, without the intervention of a jury. We say this mindful of the fact that it is contended by counsel for plaintiff in error that the case was tried below only upon the new matters set up in the amended petition, viz., upon the claim for the bank stock or its equivalent.

The record however discloses that evidence was offered in the trial below as to the terms of the contract of employment, and not only describing the services rendered thereunder by Mrs. Sellers for twelve years as the nurse and housekeeper for Mr. and Mrs. Van Wormer, but detailing with particularity

## Saylor v. Sellers.

the arduous and exacting labor and constant attention that were required of Mrs. Sellers. We can see no reason why it would have been considered necessary by plaintiff to have offered this testimony nor by the court to have spent the time in receiving it, unless it was to be applied to a determination of the claim for services upon *quantum meruit* as originally presented to the executor and as alone sued upon in the original petition and incorporated in the amended petition in the action in the court below. The court in the judgment entry found as follows:

"This cause having heretofore been heard upon the pleadings and evidence and submitted to the court, the court upon consideration thereof finds the issues joined in favor of the plaintiff and that the facts stated in her amended petition are true."

This language is not ambiguous, and embraces with certainty a finding for plaintiff on her claim for *quantum meruit*, as well as upon other issues.

There is no rule which authorizes a reviewing court to reverse a judgment simply because the court which rendered it erred in a matter of law or logic. Section 11364 G. C. provides:

"In every stage of action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed, or affected, by reason of such error or defect. In the judgment of any reviewing court upon any petition in error in any civil action, when it is sought to reverse any final judgment or decree, or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of proceedings, and judgment under review. In case such reviewing court shall determine and certify that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded and such judgment or decree

## Hamilton County Appeals.

under review shall be affirmed or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining."

The questions therefore for this court are: has substantial justice been done; and are the conclusions ultimately reached, regardless of the reasons given, substantially correct?

Following, as we think, the letter and spirit of the section quoted a majority of this court are constrained to affirm the judgment below and to answer these questions in the affirmative.

We have reached this conclusion after careful consideration of all the evidence in the case. Mrs. Sellers under the statute was incompetent as a witness, and her daughter, Mrs. Blaesi, was the only witness to the conversation which took place between Mr. Van Wormer and Mrs. Sellers at the time the contract was made. She testified that Mr. Van Wormer said:

"He wanted my mother to take care of him. Come out there and take care of him, and do for him and Aunt Julia as long as they lived; that if they did this, at his death she would be rewarded, and he knew that she could do anything for him, and that she would be satisfactory in every way, and he would satisfy her in return by giving her at his death enough to keep her the rest of her life without doing any work. So mama came, and I am not quite sure about the date, but I think it was along about the eleventh of April that mama and I went there and took charge of Aunt Julia and Uncle Asa in his home. \* \* \* so he said if she would remain and do for him, at his death she would get stocks or bonds that would yield an income from \$150 to \$200 a month, if she would stay and take care of him." (Bill of Exceptions, pages 8 and 9.)

This evidence is corroborated by the testimony of James Van Wormer and Mrs. Atherton as to what Mr. Van Wormer had told them as to his arrangement with Mrs. Sellers and what he had agreed to do in conformity thereto, and is not disputed by a word or circumstance in the record. The conversation detailed by James Van Wormer, and found on pages 85, 86 and 87 of the bill of exceptions, shows that the old gentleman at

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that time (August, 1907, one month before the execution of the unattested codicil) recognized an indebtedness to Mrs. Sellers, and contemplated making some arrangement by which she would receive at his death \$50,000 from his estate for her services performed and to be performed.

Within fifteen months from the date of her employment he had made provision for her in his will to the extent of \$8,000 and had given her a \$1,000 bond. At that time he was seventy-eight years of age. He outlived his expectancy, and it is not likely that he then expected to live to be ninety years of age. While the bequests and the gift *inter vivos* thus made can not be taken as absolute proof of the value of her services, they show that the old gentleman recognized the extraordinary nature of her labors and did not measure the value thereof by the usual standards or by any prevailing rule or custom. The evidence shows that these bequests were made in compliance with his agreement or promise as testified to by Mrs. Blaes, and when we witness them, made, as they were so shortly after she entered upon her work, it serves to remove any feeling of surprise or doubt as to his purpose expressed nine years later to give the \$37,500 worth of bank stock in further payment under his contract.

The record shows further that Mrs. Sellers knew of each of the testamentary bequests made for her at the time or soon after they were made. She objected strenuously to them as being inadequate and not a fulfillment of his promise or of the contract of employment. What did he say or do? Did he deny the agreement as she claimed it existed? No. On the contrary he gave her bonds, stocks, and made codicils in an effort to satisfy her, but to no avail. There was constant trouble about it. He may have thought her demands were unreasonable or exorbitant, but she insisted that he had not kept faith and at one time left him, removing her furniture and apparel to the city. He soon after induced her to return. Her services were apparently considered by him as almost if not quite indispensable. There were quarrels, a fight and much domestic turmoil in the household up to the time that the paper of September 16, 1907, was

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signed. The record is silent as to any trouble afterwards and the inference follows that both parties looked upon that paper as a settlement of the difficulty. The amount named therein was less than that fixed by him in the conversation with his friend a month before. It must be accepted as his estimate of what his agreement, made in 1897 and since recognized by him, required him to do. We can not see how any better evidence could have been offered as to the value of her services, and as to its admissibility for such purpose there can be no doubt.

Plaintiff below was not required to offer opinion evident as to the value of the services. He expressly agreed to provide liberally for her, insuring an income sufficient to meet her needs. This promise, together with the unusual and diversified duties of her employment, its uncertain duration, the postponement of payment until his death, all make obvious the futility of such evidence in this case and the reason same was not offered. Evidence as to the nature of the services was evidence of their value. It is not necessary in a suit on a *quantum meruit* to offer more. *McIntyre v. Garlick*, 4 Circ. Dec. 429 (8 R. 416); *Duhme Jewelry Co. v. Hazen*, 27 O. C. C. 679 (6 N. S. 606).

The amount claimed in the amended petition is \$28,921 with interest. This sum was arrived at by charging for the number of days from April 13, 1897, until August 11, 1909, to-wit, 4503 days, at seven dollars per day, and crediting thereon the sum of \$2,600 which Mrs. Sellers had received in cash on account during this time.

On December 14, 1898, Mr. Van Wormer made a codicil to his will by which he gave to Mrs. Sellers United States government bonds of the face value of \$7,000. This codicil expressly provided that this bequest was made in consideration of her services in keeping house for him and that it was to be paid to her upon his death in the event that she remained with him until that time. This codicil was afterwards revoked or became inoperative for the reason that the bonds named therein were about to be called for redemption, and on May 25, 1907, in lieu thereof he entered into a trust arrangement by which he



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placed said bonds in care of the Third National Bank of Cincinnati, Ohio, with power to reinvest the amount received for such bonds in other bonds of the United States or of the city of Cincinnati.

Under the powers contained in said deed of trust the trustee at the maturity of the United States bonds surrendered the same and reinvested the proceeds in Cincinnati viaduct bonds to the amount of \$7,000, and one United States 3 per cent coupon bond in the sum of \$100, and held the same until after the death of Asa Van Wormer, and until February 7, 1910, when the said trustee transferred and delivered said bonds to Mrs. Sellers.

The trust instrument above referred to contained a copy of said codicil of December 14, 1898, and expressly recited that the trust was created for the purpose of carrying out the said bequest, and as a payment to Mrs. Sellers for services which she had rendered and might render in the future.

Under these circumstances we think that the sum of \$7,100 heretofore received by Mrs. Sellers should have been credited upon said account presented to the executor as aforesaid, and the same not having been done, it should now be considered as a credit upon said account in the same manner as the item of \$2,600 deducted therefrom by claimant. This reduces the claim of defendant in error to \$21,821 and the judgment of the court below should be modified to the extent that it is in excess of this amount.

Plaintiff is entitled to recover the said sum of \$21,821 with interest from August 11, 1909.

Judgment affirmed as modified.

Swing, J., concurs.

Jones, O. B., J., dissenting.

The original petition in this case was the usual one for services on *quantum meruit*. It was superseded by the amended petition which still embodied all that was contained in the original petition, setting up plaintiff's claim under an implied contract and then proceeding further sought in payment for the

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same services to show an express contract for the transfer and delivery of certain bank stock, and prayed in the alternative, first, for the delivery of that stock; or, if that could not be had, for a judgment for the value of the stock; and if that could not be had, for the value of the services rendered on a *quantum meruit*.

It will be seen that the new matter in the amended petition is not in explanation or in furtherance of that contained in the original petition, but is actually inconsistent with it. If plaintiff had an express contract for this bank stock in payment for her services, she had no implied contract for seven dollars per day, or whatever their value might be. In *Creighton v. Toledo*, 18 Ohio St. 447, 451, the first paragraph of the syllabus is as follows:

"Where there is an express contract between parties, none can be implied. The maxim *expressum facit cessare tacitum* applies in such cases."

And on page 451, in its opinion, the court says:

"The plaintiff's right to recover is not founded upon a *quantum meruit*, but solely upon an express contract, which provides a stipulated mode of payment, and thus excludes the idea of a recovery upon an implied assumpsit. When there is an express contract between parties, none can be implied; the maxim *expressum facit cessare tacitum* applies in such cases."

And in *Crist v. Dice*, 18 Ohio St. 536, 542, in the opinion of the court the following language is used: "No implied obligation inconsistent with the actual agreement can arise," etc., \* \* \* "for *expressum facit cessare tacitum*."

The allegations of the express contract and the implied contract in the same petition are inconsistent. They are in no sense the same, but are repugnant to each other. They do not constitute two separate causes of action, but are two distinct causes of action pleaded together in the alternative, and relief under one cause of action would prevent the obtaining of it under the other. Plaintiff being uncertain as to which cause of action she might be able to prove and maintain, out of abun-

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dance of caution pleaded them both in the one amended petition. And they were both met by distinct denials.

As to the cause of action under the unexecuted codicil for an express consideration, the defendant interposed the bar of the statute both that the action had not been begun within six months after its rejection under Sec. 10722 G. C. nor within two years after the appointment, under Sec. 10746 G. C.

I concur with the majority of the court that these sections both constituted a complete bar. *Shahan v. Swan*, 48 Ohio St. 25 [26 N. E. Rep. 222; 29 Am. St. Rep. 517]; *Delaplaine v. Smith*, 38 Ohio St. 413; *Pollock v. Pollock*, 1 Circ. Dec. 410 (2 R. 140).

The only recovery would, therefore, be sustained under an implied contract, as set out in the original petition.

In my opinion there was no consideration given by the court below to the claim under the implied contract, nor any determination by it as to the value of the services rendered or the amount which plaintiff was entitled to receive for same. On the contrary, the court below found that plaintiff was entitled to recover as damages the value of the bank stock which had not been delivered to her in accordance with the agreement which she was barred by the statute from setting up in this case. To my mind this is clear from the words alone of the judgment, and becomes doubly so when we refer to the language of the court below in its opinion as reported in *Sellers v. Sayler*. 24 Dec. 441 (14 N. S. 1). The judgment below was based upon the finding of the court made in the following language:

"This cause having heretofore been heard upon the pleadings and evidence and submitted to the court, the court upon consideration thereof find the issues joined in favor of the plaintiff, and that the facts stated in her amended petition are true.

"The court further find that the estate of Asa Van Wormer is liable in damages for the value of the stock delivered to the plaintiff in accordance with the agreement in the amended petition, the sum of \$35,250 and that the plaintiff is entitled to owing to the plaintiff from the defendant John R. Sayler,

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executor of the last will and testament of Asa Van Wormer, deceased, upon the cause of action set forth in the amended petition, the sum of \$35,250 and that the plaintiff is entitled to have said sum paid to her out of the personal property belonging to the estate of the said Asa Wormer," etc.

Surely this judgment must be read as an entirety, and it will not do to simply rely upon the general language of the first paragraph of the finding, and from it determine that the court below had necessarily found upon the claim based upon the implied contract for a *quantum meruit*.

It is true that the language states that the court upon consideration of the pleadings and the evidence "find the issues joined in favor of the plaintiff, and that the facts stated in her amended petition are true."

If this language is to be construed as broadly as it has been by the majority of the court, then it necessarily means that the court below found that the express contract to pay bank stock for services had been established, and that the implied contract to pay the reasonable value for the same services had also been established. These two findings are absolutely inconsistent, and this is shown conclusively, to my mind, by the specific language which follows, wherein the court finds "that the estate of Asa Van Wormer is liable in damages for the value of the stock not delivered to the plaintiff in accordance with the agreement in the amended petition set forth, and that therefore there is justly due and owing to the plaintiff," etc.

Construing these two paragraphs together shows specifically which one of the two inconsistent causes of action put in the alternative in the amended petition was found in favor of the plaintiff to be true. And the value of this stock, as fixed by the testimony of the witnesses, shown in the record, is the amount for which the judgment was entered.

In other words, the cause of action which has been barred is used as a basis for the foundation of the judgment below. While it is true that there is sufficient evidence shown in the record to have enabled a jury or court on submission to determine the value of the services rendered by plaintiff in her ac-

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tion on an implied contract for the value of such services, the record fails to show any consideration of that evidence for the purpose of fixing such value. It will not do to say that the unexecuted codicil furnishes in itself a basis of value, as we have seen, it is eliminated from the case by reason of the bar of the two statutes above mentioned except in so far as it might furnish evidence that the decedent recognized some obligation, whether as a legal liability or as a moral duty.

This paper is not contractual in its form, but is of a testamentary character. The record shows that testator was constantly considering how he should dispose of his large fortune, and it is but natural that plaintiff should have been considered among others as well worthy of his benefaction. The testimony of James Van Wormer as to his conversations with testator indicates that he was not considering the value of plaintiff's services to himself, but rather undertaking to determine what portion of his estate he should bestow upon her, while making generous gifts to other individuals and to numerous charities.

The opinion of the court may be resorted to, to show what was adjudicated. *Topliff v. Topliff*, 4 Circ. Dec. 312 (8 R. 55).

In the syllabus of the opinion of the court below it is stated:

\* \* \* "The compensation thus provided was larger than she could have expected on a *quantum meruit*.

\* \* \* "The agreement must be regarded as established and the estate as liable in damages for the value of the stock so promised, notwithstanding her mercenary motive, the excellent bargain she drove, and the defective character of the agreement upon which she relies."

And in the body of the opinion, the following language is used:

"Except that the agreed compensation is large, and greater probably than could be given in an action for the reasonable value of such services, there would be little hesitation in finding the agreement to be as claimed."

It therefore seems to me that the judgment below was based entirely upon a wrong hypothesis; that the court found an express contract and therefore gave no attention to any

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proof as to the value of services under an implied contract. And while it is the duty of this court, under Sec. 11364 G. C. to "disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party," I can not bring myself to believe that a trial based upon a wrong theory, wherein the real issue that can be determined by the court is disregarded, and a judgment rendered on an issue which can not under the law be considered, is one where the "substantial rights of the adverse party" are not affected, and this even though the amount of that judgment might possibly coincide with the amount which could have been rendered under an implied contract. It was certainly "the substantial right" of the defendant below to have the trial court consider and determine separately the only claim which plaintiff was entitled under the law to submit to the court, viz.: the claim made under *quantum meruit*, and when the trial below consisted only of the determination of the claim under the express contract (which all the judges of this court agree could not be considered), it can not be said that "substantial justice has been done" to defendant.

The record shows that the plaintiff has rendered services to the decedent for which she should receive liberal compensation, and it would be unfortunate that the settlement of the estate should be unnecessarily delayed by the sending back of this case for retrial. But where the amount plaintiff may be entitled to receive as the value of the services rendered by her has, as I believe, not been considered or determined by the court below, it is, in my opinion, not the province of this court on error to take up that question and determine it from the record as though this were a trial court; nor is it correct for this court to now modify the judgment of the court below by fixing it at the amount claimed in the petition reduced only by the payments which have been admittedly received by plaintiff on account of her services.

White v. White.

### WILLS.

[Wood (6th) Circuit Court, October 28, 1911.]

Wildman, Kinkade and Richards, JJ.

\*FRANK WHITE (ADMR.) v. JOHN WHITE ET AL.

**Determination as to Amount Widow of Deceased Son Should Receive Where Son Died Before Testator.**

Under the provisions of the will construed in this case, the widow of the deceased son is held to be entitled to receive the share which would have gone to the said son had he survived the testator, less the amount specially provided to be paid by her in the codicil appended to the will after the death of said son.

[Syllabus by the court.]

### APPEAL.

*Rheinfrank & Ohlinger* and *Edward Beverstock*, for plaintiff.

*Edgar H. Johnson* and *Jos. W. Lane*, for defendants:

Cited and commented by the following authorities: *Worman v. Teagarden*, 2 Ohio St. 380; *Painter v. Painter*, 18 Ohio 247; *Charch v. Charch*, 57 Ohio St. 561 [49 N. E. Rep. 408]; *Richards v. Miller*, 62 Ill. 417; *Armistead v. Armistead*, 32 Ga. 597; *Defreese v. Lake*, 109 Mich. 415 [67 N. W. Rep. 505; 32 L. R. A. 744; 63 Am. St. Rep. 584]; *Gilmore, In re*, 154 Pa. St. 523 [26 Atl. Rep. 614; 35 Am. St. Rep. 855]; *Bates v. Alexander*, 127 Ala. 328 [28 So. Rep. 415]; *Grimms v. Harmon*, 35 Ind. 198; *Davis v. Taul*, 36 Ky. (6 Dana) 51; *Miller v. Miller*, 29 O. C. C. 451 (9 N. S. 242); *Weston v. Weston*, 38 Ohio St. 473; *Eby's Appeal*, 84 Pa. St. 241; *Hochstein v. Berghauser*, 123 Cal. 681 [56 Pac. Rep. 547]; *St. Mark's Lodge of F. & A. M. v. Darrow*, 16 Dec. 120; *Jones v. Lloyd*, 33 Ohio St. 572; *Reif v. Ulmer*, 20 Dec. 342 (9 N. S. 234); *Lincoln v. Perry*, 149 Mass. 368 [21 N. E. Rep. 671; 4 L. R. A. 215]; *Clark v. Hardwick Seminary (Tr.)*, 2 Circ. Dec. 87 (3 R. 152); *Lester's Estate, In re*, 115 Iowa 1 [87 N. W. Rep. 654].

### RICHARDS, J.

This is an action brought for the purpose of obtaining a

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\*Affirmed, no op., *White v. White*, 88 O. S. 589.

## Wood County Circuit.

construction of the will of Henry Rudolph White, deceased. The will was executed on July 23, 1894, on which date the testator had five children then living. The will, after making various preliminary dispositions of property, contains the following clause:

"The remainder of my estate, real and personal, shall be divided equally between my children or their heirs share and share alike."

One of the children of the testator by the name of Henry White died intestate on June 3, 1895, without issue, but leaving surviving him a widow, Rose White. On December 21, 1895, the testator, Henry Rudolph White, executed a codicil to his will, which codicil contains the following language:

"The sum of \$88 lawful money of the U. S. bearing interest at 6 per cent. from the first day of July, 1895, till paid shall be paid to my daughter Carolina White, her heirs or assigns, out from the share of the inheritance of my son Henry White, deceased. The residue of said share shall be the only bequest to the heirs or assigns of said Henry White."

*Held:* That under the terms and provisions of the will and codicil, the widow, Rose White, is entitled to receive the share which would have gone to her husband, Henry White, if he had survived the testator, less the sum of \$88 and interest thereon as provided in the codicil.

This construction of the will is not changed by the extrinsic evidence offered. So much of that evidence as tends to show the situation, circumstances and condition of the testator and the natural objects of his bounty, is competent, the remaining portion of it we hold to be incompetent, and we cite the following cases: *Lester's Estate, In re*, 115 Iowa 1 [87 N. W. Rep. 654]; *Lincoln v. Perry*, 149 Mass. 368 [21 N. E. Rep. 671; 4 L. R. A. 215]; *Clark v. Hardwick Seminary (Tr.)*, 2 Circ. Dec. 87 (3 R. 152).

A decree may be drawn construing the will in accordance with the views expressed in this opinion.

Wildman and Kinkade, JJ., concur.



Meredith v. Manufacturing Co

### JUDGMENTS AND DECREES.

[Morrow (5th) Court of Appeals, October 15, 1915.]

Shields, Ferneding and Houck, JJ.

(Judge Ferneding of the 2nd district sitting in place of Judge Powell.)

B. M. MEREDITH ET AL. V. BUTLER MANUFACTURING CO.

**Vacation of Joint Judgment Entered without Personal Representative of Joint Defendant Dying after Submission.**

The vacation of a joint judgment as to one of the joint judgment debtors vacates it as to all, where the subject-matter of the action is such that the plaintiff could not have prosecuted several actions; and a trial court in such a case, a *prima facie* case having been tendered, should grant a vacation as to all the defendants but suspend the order pending a new trial on the merits.

[Syllabus by the court.]

ERROR.

*Mitchell & Bruce*, for plaintiffs in error.

*J. M. Schooler and Harlan & Wood*, for defendant in error.

**HOUCK, J.**

The plaintiffs in error have filed in this court a supplemental petition in error, alleging that since the trial of this cause in the common pleas court, and since the same was partly heard in this court, the plaintiffs in error, Sarah J. Huntington, as administratrix of the estate of R. N. McMahon, deceased, filed their petition in the common pleas court of Morrow county, Ohio, asking for a vacation of and suspension of a judgment formerly made and entered by said court in said proceedings below, and for leave to file answer therein, for the reasons set forth, and upon the grounds stated therein.

The common pleas court refused to grant the relief prayed for, but entered a judgment affirming the former judgment of the court therein, save and except as to R. N. McMahon, and as to the judgment against him enjoined the plaintiff below

## Morrow County Appeals.

from issuing an execution against or in any way attempting to collect said judgment, or any part thereof, from the estate of the said R. N. McMahon, deceased.

Plaintiffs in error claim that there is error in the record and proceedings in said common pleas court, in said supplemental proceedings, to their prejudice, in the following particulars, to-wit:

1. In refusing to vacate the judgment against all the plaintiffs in error, the defendants below.

2. After vacating the judgment against McMahon, the court's refusal to suspend the judgment against all of the defendants below, and set the cause down for trial.

3. The court's refusal to permit the plaintiffs in error, the defendants below, to file an answer which contained two new and additional defenses.

4. Modification of the original judgment without a trial.

Upon these grounds the plaintiffs in error seek a reversal of the judgment below.

The original action out of which this proceeding arises was commenced in the common pleas court of Morrow county, Ohio, in December, 1909, by the defendant in error, the Butler Manufacturing Company, against the plaintiffs in error, A. E. Bell, R. N. McMahon, since deceased, and others.

The issue was duly made, jury waived, and the cause was tried to the court, and judgment rendered against the defendants below for \$2650, with interest. A motion for a new trial was filed, heard and overruled, and error was prosecuted to this court, the petition in error alleging that after said cause was tried and submitted, R. N. McMahon, one of the defendants died on or about November 4, 1912, before the cause was tried in common pleas court, and before judgment was entered; that no suggestion of the death of said R. N. McMahon was made to the court, and no personal or legal representative of the decedent was made a party to the action, but the case was tried and a joint judgment rendered against said R. N. McMahon and the other defendants in said cause, after the death of said McMahon, and without his legal

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or personal representative being made a party defendant therein.

The petition in error came on for hearing in this court at the June term, 1913, and the above alleged error not appearing in the record, this court was without jurisdiction to hear and determine the same, and the cause was continued to give plaintiffs in error an opportunity to proceed under the provisions of Sec. 11631 G. C., or other similar provisions, to obtain their remedy.

This case is an important one, relating to questions of practice that are of vital importance to the bench and bar.

From an examination of the record we find that the original suit upon which this proceeding is based was founded upon a joint contract, and the judgment rendered therein in the trial below was a joint judgment, and therefore the only question presented to this court for determination is, Does the vacating of a joint judgment against one defendant and joint judgment debtor vacate it as to all?

Section 11631 G. C. provides:

"The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which it was made: \* \* \*

(6) For the death of one of the parties before judgment in the action."

Under this section, and Secs. 11636 and 11637 G. C., the successive steps required to vacate a judgment after term are as follows:

"1. An application filed in the original case, stating the ground of vacation and the defense, upon which summons shall issue, and no further pleading is required.

"2. Hearing on the application.

"3. If ground for vacation is found to exist and a valid defense is averred in the application, the judgment shall be vacated, but the lien of the original judgment saved by suspending the order of vacation pending trial on the merits.

"4. A pleading setting up a defense, and a trial upon the issues made, as if no judgment had been rendered.

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"5. The rendering of a judgment which shall either restore the old judgment or extinguish it, as the facts found on the trial demand."

In determining whether there is error in this record it is proper to inquire as to whether or not the plaintiff in the original action below could have maintained a separate action on the contract against each of the obligors, had they elected so to do, or was their sole remedy on the contract against them jointly?

There can be little doubt that the cases wherein it is proper to render a several judgment against one or more of the defendants in the suit, thereby leaving the cause to proceed against the others, are limited, as a general rule, to certain actions. The difficulty, however, is in determining whether these cases wherein such judgment is forbidden includes actions on joint and several contracts, on which the plaintiff might have elected to prosecute several actions. Some courts have held that they are confined to actions on joint contracts, when the plaintiff had no election as to the joinder of defendants, and therefore was compelled to bring a joint suit, and that his only remedy was such; others have held the contrary to be the rule.

We think that Sec. 11584 G. C. will materially aid us in the proper determination of the question before us. The section provides:

"In an action against several defendants the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

A fair construction of this statute, with the facts presented in this case, and applying thereto what seems to us to be the rule of law applicable to the same, should aid us in reaching a proper conclusion. A court in its discretion may render a judgment against one or more of the defendants, leaving the action to proceed against others, whenever it appears that the plaintiff might have demanded a several judgment on the contract if he had elected to sue the defendants

## Meredith v. Manufacturing Co.

separately. On the other hand, if the subject-matter of the action is such that the plaintiff could not have prosecuted several actions, then and in that event his only remedy would be to demand a joint judgment, and in a joint action, and in such case he cannot have a several judgment against any of the defendants until the liability of each and all of the defendants has been determined upon final trial of all the issues in the case.

In the case at bar the vacating of the judgment against one of the plaintiffs in error, the defendants below, thereby vacated it as to all. This being so, and ground for vacation having been found to exist, and a *prima facie* defense having been tendered by the plaintiffs in error, the defendants below, the judgment as to all of them should have been vacated, and the order of vacation suspended pending a trial on the merits.

The judgment is reversed, and cause remanded to common pleas court for a new trial.

Shields and Ferneding, JJ., concur.

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ERROR—ESTOPPEL—NEGLIGENCE.

[Holmes (5th) Court of Appeals, November 1, 1915]

Shields, Powell and Houck, JJ.

ROBERT S. TORBET v. NORA YOUNG.

1. Party Estopped on Error First to Complain of Trial of Issue for Money Only without Jury.

Where so far as the record discloses, a party sat by in silence and permitted an action for money only to be tried without the intervention of a jury without interposing an objection thereto, he is estopped from complaining for the first time in a court of review that he was prejudiced thereby.

2. Ballee Loaning Money to Stranger on Unrecorded Deed with Abstract of Perfect Title, Guilty of Gross Negligence and Liable for Full Loss on Forgery of Deed Shown.

An agent or ballee, serving without pay, made a loan on farm property to a stranger the title whereof was shown by an abstract to be perfect in the grantee of the borrower, who exhibited an unrecorded deed to the property which was placed

## Holmes County Appeals.

on record before the loan was consummated. The deed proved to be a forgery, and the owner of the funds loaned brought an action against the party who acted for her in making the loan for the amount of her loss. Held:

The making of the loan to a stranger, without further inquiry than as to the validity of the title in his grantor, was gross negligence, and plaintiff is entitled to judgment for the full amount of the loss.

[Syllabus by the court.]

## ERROR.

*Taggart & Ross* and *N. Stilwell*, for plaintiff in error.

*C. R. Cary*, for defendant in error.

## HOUCK, J.

This is a proceeding in error seeking to reverse a judgment of the court below in a suit in which the present defendant in error, Nora Young, was plaintiff, and the plaintiff in error, Robert S. Torbet, was defendant. The petition of the plaintiff below is as follows:

"Plaintiff in her petition avers that some time prior to the fourteenth day of October, 1910, the defendant was employed as the agent of plaintiff to obtain and make for plaintiff safe loans secured by mortgage on real estate of which plaintiff had knowledge in the vicinity of defendant's home in Ripley township, Holmes county, Ohio, and on or about September 12, 1910, the defendant received from plaintiff about \$2800 in money to be held by him in trust for plaintiff, and to be used by defendant for said purposes, and for no other purpose; that defendant has failed and refused to comply with and carry out the terms and conditions of said agency and trust, and refused to account for said money on demand, and prays for an accounting and for judgment for the amount found to be due, and for other relief, and for costs."

The defendant below filed an answer setting forth two defenses, the first defense being a general denial and the second defense being in substance as follows:

"That on or about September 10, 1910, and for a long time prior thereto he received from plaintiff divers sums of money and at her request made loans and investments in her

## Torbet v. Young.

name; that on or about September 12, 1910, he received \$2800 for said plaintiff, and informed her of the fact, and at her request retained said money, to be loaned and invested for her; that he loaned said money to one William Hoover who represented himself to be the owner of a farm of ninety-seven acres situated near the village of Dalton in Wayne county, Ohio; that Hoover executed his promissory note for \$2800 with interest at six and one-half per cent due in three years and his mortgage deed conveying said farm to plaintiff to secure said note, and delivered said note and mortgage to defendant, and that said defendant placed said note and mortgage with other papers and evidences of indebtedness belonging to plaintiff, which were deposited in the Farmers' Bank at Shreve, Ohio; that all of said defendant's acts relating to the loaning of said money were in good faith, without compensation and wholly gratuitous, and that in all of his acts pertaining thereto he exercised reasonable care and prudence."

The answer further alleges, and in detail, that notwithstanding the fact that it was afterwards learned that the deed to said ninety-seven acre farm upon which said \$2800 loan was made had been forged by said Hoover, and although Hoover had not the legal title to said farm, yet said loan having been made in good faith, and he (Torbet) having exercised reasonable care and prudence, prays to go hence without day.

A reply in the nature of a general denial was filed by plaintiff below to this answer, and upon the issue joined the case was submitted to the court upon the evidence, without the intervention of a jury. The record is silent as to anything relating to the submission of the cause to a jury. The court found for the plaintiff below in the sum of \$2800 with interest from October 14, 1910. The plaintiff in error seeks a reversal of this judgment upon two grounds: First, that the cause being one triable to a jury the court below erred in permitting the same to be tried without the intervention of a jury. Second, that the judgment is manifestly against the weight of the evidence and is contrary to law.

Proceeding now to the alleged errors let us first determine

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whether or not the action at bar is for the recovery of money only. This must be determined from the language of the petition and the relief sought therein. Without discussing the question further we think the allegations of the petition constitute a cause of action for the recovery of money only which, therefore, is triable to a jury. Having arrived at this conclusion the next inquiry is, Have the rights of the plaintiff in error been prejudiced by the court trying the case and rendering a judgment without a jury having been first waived? The record shows that both parties appeared and without objection or question as to the right of the court to try and determine the cause submitted the same to the court, and the first objection in that regard is made in this court. No question is made here that the court below was without jurisdiction to hear and determine the rights between the parties, but it is claimed that being an issue triable by jury that it could not be tried by the court without a waiver by the parties of a jury, and there being no waiver by the parties of record the judgment should be reversed.

So far as appears from the record here presented the defendant below preferred to have the case tried to the court and not submitted to a jury; he made no demand for a jury trial; he sat by in silence and permitted a trial to the court without interposing any objection thereto, and made none until after the issues were found against him, and he certainly is now estopped from making any such claim. We think the rule of law here laid down is well established in Ohio, and we need refer to but two cases: *Bonewitz v. Bonewitz*, 50 Ohio St. 373, 377, 378 [34 N. E. Rep. 332; 40 Am. St. Rep. 671], where the court say:

“To submit a cause to a court is an affirmative act. It is to ask the court to hear the evidence, consider it, and apply the law. What more potent ‘consent’ could be given than this? A jury was not demanded because, in all probability, the counsel and the court alike regarded it as a court, and not a jury, case. \* \* \* But actions sometimes speak louder than words. It was not until after the court had found and ad-



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judged against the defendant that he discovered he had been prejudiced by not having his cause tried to a jury. His objection to the mode of trial, we think, comes too late. To sustain his claim would seem to be trifling with justice. He proceeded to trial, without objection, to a court having jurisdiction of the parties, and capable of being clothed with jurisdiction of the subject-matter for all purposes, taking his chance of a favorable result, and cannot, now that the chance is turned against him, be heard to question the authority of the tribunal to which he consented to submit his cause."

And also the case of *Lingler v. Wesco*, 79 Ohio St. 225 [86 N. E. Rep. 1004; 21 L. R. A. (N. S.) 182; 128 Am. St. Rep. 714], where the court say:

"Therefore it appears that no one objected to the court hearing the evidence and passing upon it. No one asked for a jury, but the parties proceeded with the submission of the case. The condition of the record here warrants the use of the rule established in *Bonewitz v. Bonewitz*, 50 Ohio St. 373. A party may waive his right to a jury trial by acts as well as by words."

Coming now to the second ground of alleged error, namely, Is the judgment manifestly against the weight of the evidence and contrary to law? Counsel for plaintiff in error contend that the said plaintiff in error occupied the position of agent or bailee of the defendant in error, without pay, and being a gratuitous agent or bailee could only be held liable for acts of gross negligence. Admitting that to be the law do the facts in the case at bar as disclosed by the record, and applying thereto the well established elements necessary to constitute gross negligence, warrant the finding of this court that the plaintiff in error was guilty of gross negligence; or did he, under all the circumstances and surroundings, act and do in the premises and exercise such care as a person of common prudence should have done? Counsel for plaintiff in error inquire, "What could Torbet have done that he did not do to be more careful in negotiating this loan? He was informed by Judge Weiser of the character and value of the land; he acquired an abstract

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of title which showed the title to be perfect; he insisted that the abstract be made by attorneys in whom he had confidence and who had been attorneys for Mrs. Young in her claims and partition suit; he saw the note and mortgage signed; took it to the recorder's office and had it recorded; saw that Hoover had the deed transferred at the auditor's office and duly recorded, and retained the abstract in his possession, placing the note with the rest of Mrs. Young's papers."

We think these inquiries would be pertinent if the loan that Torbet was about to make for Mrs. Young was being made to the Mosers, the alleged grantors in the deed to Hoover, but the loan was being made to Hoover, and it seems to the court that the real foundation or basis of the loan was the strength of the title in William Hoover. The loan was being made to him, and Torbet's inquiries and investigations should have at least been directed as to the title in Hoover. Hoover was a perfect stranger, and we might ask, what inquiry did Torbet make as to him? Not any! What inquiry, if any, did any of the persons in interest make as to the standing, honesty or integrity of William Hoover? Not any! A stranger, unknown to Torbet or any one connected with the transaction was entrusted with the duty of seeing that the deed from Moser to him was properly executed—which afterwards proved to be a forgery. Hoover stated that he was a widower, and without any inquiry on the part of Torbet to ascertain as to the truthfulness or untruthfulness of that statement he was permitted to sign the mortgage alone, and received the \$2800 from Torbet. Without any acquaintance with or knowledge of Hoover on the part of Torbet prior to this transaction he assigned the \$2800 certificate of deposit over to him, and at least stood by and saw him receive the money from the bank on this certificate of deposit. All of this was done with a stranger; no one had recommended him to Torbet, and so far as the record shows he made no inquiry concerning Hoover. What inquiry did Torbet make of the grantors in the deed, or of the witnesses to it, or of the notary who was reputed to have acknowledged it? Not any! In the face of these facts can it be

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properly claimed that plaintiff in error exercised that care and prudence required of a gratuitous agent or bailee? Certainly not. What constitutes gross negligence has been defined by our Supreme Court in the case of *Johnson v. State*, 66 Ohio St. 59, 67, 68 [63 N. E. Rep. 607; 61 L. R. A. 277; 90 Am. St. Rep. 564], where the court say:

“Negligence may consist of acts of omission as well as commission, and what may be mere ordinary negligence under one class of circumstances and conditions may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or every slight care. There are other definitions, but these are sufficient now for our purpose. So we may truly say that negligence differs only in degree. With this, we cannot overlook what experience has taught for many years: that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The inferences drawn from the same facts by different minds may often greatly differ.”

Applying this rule of negligence to the facts in the present case the plaintiff in error certainly was guilty of such negligent acts of omission as well as commission as would not justify a reversal of the judgment below. We think the claim made by the plaintiff in error is untenable, and finding no error in the record prejudicial to the rights of plaintiff in error the judgment of the common pleas court is affirmed.

**Shields and Powell, JJ., concur.**

## Hamilton County Appeals.

## CONTRACTS.

[Hamilton (1st) Court of Appeals, July 30, 1913.]

Swing, Jones and Jones, JJ.

\*J. A. EBERHARDT v. HAMILTON CO. (BD. OF COMRS.)

**Extra Compensation to Cover Loss Resulting from Delay in Completing Street Improvement Contract, Denied to Contractor Advised of Conditions.**

A contractor, by the terms of a contract for a street improvement, advised that the running of electric cars thereon was not to be interfered with, that the tracks were to be readjusted by the railway company, and that the right was reserved to suspend the work at any time for the purpose of reconstructing said tracks and no claim for damages was to be made by reason thereof, will not after final completion of the work be allowed damages because of protracted delay in the readjustment of the tracks which made it necessary to do the work under unfavorable and more expensive conditions.

## ERROR.

*Joseph W. O'Hara, Gideon C. Wilson and Joseph Wilby,*  
for plaintiff in error.

*Pogue, Campbell & Groom and Ireton & Schoenle,* for defendant in error.

JONES, O. B., J.

The case below arose upon an appeal made to the court of common pleas by J. A. Eberhardt from the action of the county commissioners of Hamilton county, rejecting his claim for damages growing out of a contract between him and the county commissioners for the improvement of Carthage pike through the villages of Carthage, Elmwood and St. Bernard in said county.

The contract provided for the grading and paving of said pike with granite blocks. In the center of said roadway were double street car tracks which plaintiff claimed said commissioners failed to have removed so that he could proceed to make

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\*Affirmed, no op., *Eberhardt v. Hamilton Co. (Comrs.)* 60 Bull. 113; 91 O. S. 000.

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such improvement without interference therefrom. The record shows that at the time the work was commenced there was some controversy between the street railway company operating on said tracks and the village of Carthage with regard to the operation of said street railway and the right of the company to maintain such tracks to operate in the manner it was then doing, and because of this controversy no arrangement was made by said street railway company at the time the paving was commenced by the contractor for the relaying and readjustment of said tracks, but the paving was laid between the curb and the end of the ties on either side of said tracks before any paving was done in the center. Plaintiff in error contended that this method of operation was not contemplated by the parties at the time the contract was made, and that it had entailed heavy additional expense upon him by reason of being compelled to work in narrower quarters which prevented adoption of the usual method employed in such construction work. The basis of his entire claim is practically the additional expense claimed to be caused by the complications arising out of relaying the street car tracks.

The case below was tried before a referee appointed to take and report the testimony and his findings of fact and law. An extended trial was had, and the testimony and exhibits, with the report of the referee, are embodied in the bill of exceptions consisting of eight bound volumes of typewriting. The report of the referee was adverse to the claim, and the court below entered a decree overruling the exceptions of Eberhardt to the report of the referee, and confirming the report dismissing the appeal. A motion for a new trial was filed by Eberhardt, which was overruled by the court. To reverse that judgment and decree the error proceedings are brought in this court.

The specifications under which the work was done provided, in Sec. 1, that:

"Each party will examine the location of the work and judge for himself as to all of the circumstances affecting it. No information derived from official or other sources will re-

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lease the contractor from fulfilling all of the conditions of the contract."

And the contractor admitted that he had looked over the ground and knew of the existence of the street railway tracks, and knew of the provisions which were embodied in the contract in Secs. 35 and 13, which are respectively as follows:

35. "Street Railway Tracks. Where the roadway is to be occupied by street railway tracks, they will be readjusted, renewed and placed in position by the railway company, to the lines and levels given by the engineer, and all expenses pertaining to the laying of the street railway tracks shall be paid for by the railway company \* \* \* but all work within the rails of said tracks, such as paving with granite and foundation, shall be done by the contractor for the street improvement as contemplated in these specifications.

"Where, in the opinion of the chief engineer of the board of county commissioners it is not necessary to renew the track stringers or cross-ties of the street railway tracks, the said tracks shall be adjusted as required of the specifications, and the subgrade of foundations be thoroughly compacted by the contractor with rammers at all points inaccessible to the roller, and without disturbing the tracks. \* \* \* Where electric railway tracks are laid prior to the pavement, the contractor will be required to construct street, including the laying of pavement, without interrupting the running of electric cars. The contractor will also be required to pave between and alongside all street railway rails that are or may be laid of whatever pattern, cutting the blocks to fit the level of said rail without additional compensation to that bid for paving."

13. "The right to construct or reconstruct any electric railway \* \* \* at any time prior to the completion of the road covering over the line of the same, is expressly reserved by the board of county commissioners, and the contractor shall not be entitled to any damages by reason thereof, and said board of county commissioners reserve the right of suspending the work on any part of said street for the purpose above stated without

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compensation to the contractor for said suspension, but shall extend a corresponding time for completion of said work."

It is clear, therefore, that the contractor was advised that the running of the electric cars was not to be interrupted by his work, and that the street railway tracks were to be adjusted by the railway company, and that the commissioners reserved the right to suspend work on any part of said street at any time for the purpose of constructing or reconstructing such electric railway, and that no claim for damages by reason thereof should be claimed. And under Sec. 5 of the specifications the right to change the method of construction in any particular was reserved to the engineer, subject to approval by the commissioners, and the contractor agreed not to claim damages on account thereof.

The record fails to show any interference by the commissioners on behalf of the county with the work of the contractor, that was not permissible under the terms of the contract, or that would in any way entitle the contractor to a claim for damages other than the extra amounts that were allowed him in the payments already made for the work. The contractor at the outset was met with the proposition that the car tracks would not be immediately readjusted in Carthage, where the work was begun, and he proceeded with the work under this condition. And this condition continued up to the time that he himself obtained from the traction company a contract for re-adjustment and relaying of said street car tracks, which was on October 27, 1903. Any claim, therefore, that he might properly make an account of the interference of the street railway tracks would be limited to the period before the time when he became responsible for the work of relaying said tracks.

The work of construction extended over a much greater period of time than that fixed by the contract, and it is apparent from the record that the work during the first part of the entire period was more expeditiously and cheaply done than that during the latter part of the period, and it is shown by the testimony of one of the witnesses—an engineer named Innes, called by the county and not disputed—that the cost of the

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part of the work in Carthage where the interference of the street railroad tracks existed was cheaper than the corresponding work at the southern part of the improvement where no such interference existed.

The court is of the opinion that the plaintiff failed to prove any damages caused by any act or failure to act on the part of the county commissioners or under the terms of their contract. A careful examination of the record fails to disclose any error in the proceedings below prejudicial to the plaintiff in error.

Judgment of the court below is therefore affirmed.

Swing and Jones, E. H., JJ., concur.

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**BOUNDARIES.**

[Hamilton (1st) Court of Appeals, February 22, 1913.]

Swing, Jones and Jones, JJ.

**LOUIS HELBLING ET AL. V. WERK REALTY CO.**

**Boundary Line Accepted as the True Boundary for More than Twenty-One Years Becomes the Established Boundary Line.**

Where the deeds of adjoining landowners call for the section line as the boundary line, and a fence maintained for more than twenty-one years on the supposed section line was treated by both landowners as the true boundary, the line as so marked becomes fixed as the true line, and can not be changed against the will of either owner by a survey which shows that the old fence did not follow the true section line.

**ERROR.**

*L. H. Pummill*, for plaintiffs in error.

*Thorne Baker*, for defendant in error.

**JONES, O. B., J.**

The action below was a proceeding to enjoin defendants from trespassing and entering upon premises claimed by plaintiff and from taking down and carrying away a fence which it had placed upon what it claimed to be the boundary line between the lands belonging to the respective parties.



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Defendants by answer and cross petition denied the title and possession of plaintiff and claimed title and possession themselves in the strip of land in dispute, by adverse possession. Issue was joined by reply and a jury was waived, and the cause was heard and submitted to the court. The court found for the plaintiff and that the line between plaintiff and defendants' lands was the true section line, being a straight line from one section corner to the other, and entered a perpetual injunction as prayed for. To this decree defendants prosecute error.

The question to be determined in this case is the division line between the parties. The description of the respective tracts of land in the deeds each called for the section line as the boundary. The evidence shows that as early as 1868 the different owners of these tracts had constructed and maintained from time to time a fence upon a line to which each had continuously occupied, and while the land now owned by plaintiff had been in woods and uncultivated, that owned by defendants had been plowed and cultivated down to the line of the original fence, and while these fences had become dilapidated, plaintiff or its predecessors in title had recognized this line by placing stones therein in the Werk partition in 1894 or 1895 and by building a pasture fence upon it. And it was only at about the commencement of this suit when the straight line was run by Engineer Burke from one section corner to the other and plaintiff first built its fence upon it, that any question was raised as to the old fence line not being the true section line.

These facts bring the case directly within that of *Yetzer v. Thoman*, 17 Ohio St. 130 [91 Am. Dec. 122], in which the syllabus is as follows:

"Where one of two proprietors, respectively, of adjoining lands holds actual, continuous, notorious and exclusive possession up to a certain line, though not originally the true one, for the full period of twenty-one years, the statute of limitations applies in its favor, and against the adjoining proprietor, although such possession may have grown out of the mutual mistake of the parties respectively in respect to the locality of what was originally the true line between them."

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And following this case, the question of whether there had been a mistake in the line or what the motives of defendants or their predecessors in title had been in so occupying to the old line becomes immaterial.

Judge Brinkerhoff in the opinion of the court in the above case at page 132 uses the following language:

"We think under our statutes of limitations, if a party establish in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disability, acquires a title to the land; and this irrespective of any question of motive or of mistake."

Nor do we think that the testimony of the witness Marshall, whose wife had owned the land and conveyed same to Helbling, can be said to toll the statute of limitations. He admitted that he knew nothing of the subject of the controversy or the fences or the boundaries. Nothing in his testimony contradicts other evidence showing occupancy to the old line.

"Where the statute of limitations is interposed in an action of ejectment and it is shown that the original seizure was a disseizin, any subsequent act or declaration of the claimant or his predecessor in title which does not estop the claimant to plead the statute nor suspend the right of the holder of the title to prosecute an action to recover possession, will no be sufficient to arrest the running of the statute. Neither a mere offer to buy within the twenty-one years, nor an acknowledgment by the claimant within that time that the title is in another, or that the claimant does not own the land, will have that effect." *McAllister v. Hartzell*, 60 Ohio St. 69 [53 N. E. Rep. 715].

And in the opinion in this case, Spear, J., quotes with approval at page 90 from *French v. Pearce*, 8 Conn. 439 [21 Am. Dec. 680], this language:

"The possession alone, and the quantities immediately attached to it, are regarded. No intimation is there as to the motive of the possessor. If he intends a wrongful disseizin, his actual possession for fifteen years gives him title; or if he occupies what he believes to be his own, a similar possession gives

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him title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason, that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character and not the remote views or belief of the possessor."

And again at page 93 Judge Spear indorsing the principle of the case of *Dayton v. Marshall*, 1 Rice Eq. 373, declares the rule to be "that where it is shown that the original seizure was a disseizin, no subsequent act or declaration of the claimant should be held to toll the statute which does not deprive the holder of the title of his right to prosecute his action to recover possession or suspend the same."

The unreported case of *Reily v. Whiteman*, 69 Ohio St. 543, followed this case.

The decision below was erroneous and is therefore reversed and the cause is remanded for new trial.

Swing and Jones, E. H., JJ., concur.

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**ACTIONS—CONTRACTS.**

[Hamilton (1st) Court of Appeals, June, 1914.]

Swing, Jones and Jones, JJ.

**J. WILLARD HALEY V. GRACE KING AND HAZEL Z. KING, ADMRS.**

**1. Paper Writing in Form of Promissory Note Held to Be Contract Requiring Proof of Performance.**

A writing binding the estate of the maker for a specified sum immediately after her death in payment for services rendered and to be rendered, is not a promissory note, but a contract under which it would be necessary for the person named therein to prove rendition of the services agreed to be rendered.

**2. Defense of Adjudication not Denied by Allegation of Pendency of Cause in Supreme Court.**

The defense that a claim has been adjudicated and all matters pending between said parties were included in said adjudication is not denied by an allegation of the pendency of an action in the Supreme Court to reverse said judgment; nor is a denial of every other matter not admitted a denial of the defense set up in the action so pending in the Supreme Court.

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## ERROR.

*S. O. Bayless and Nelson & Hickenlooper*, for plaintiff in error.

*H. E. Engelhardt and R. M. Ochiltree*, for defendants in error.

## SWING, J.

This case is in this court on error to the judgment of the court of common pleas.

It was in that court that Haley brought an action on what he alleged was a promissory note, against the estate of Susan M. Zilar, deceased. The note was in the following form:

"CINCINNATI, October 11, 1902.

"In consideration of valuable services rendered to me and to be rendered for me by J. W. Haley in the management of my property, and for his advice and assistance in preventing great losses to me, I agree and bind myself to pay to said Haley, his heirs or assigns ten thousand dollars, to be paid immediately after my death, and I direct my executors or administrators to pay same accordingly.

"(Signed) SUSAN M. ZILAR."

Haley assigned the note to his wife, with the provision that if it became due during his lifetime he should have a right to collect the same; and then his wife afterwards reassigned the note to him.

Several defenses were set up by the defendant—among others the giving of the note by Susan M. Zilar was denied; want of consideration was alleged; and the further defense that in an action pending between Susan M. Zilar and J. Willard Haley for an accounting, the question of the right arising under this paper was fully adjudicated and reversed.

Plaintiff offered the note in evidence, together with evidence tending to show the signature was that of Susan M. Zilar, and the further fact that the note had been presented to the administratrices for allowance. And thereupon the plaintiff rested.

**Haley v. King.**

Defendant offered no testimony. Thereupon the court instructed the jury to bring in a verdict for the defendant.

In doing this, we think the court of common pleas did not err. In our judgment the alleged note is not a promissory note; it is a contract. This is rendered so by the provisions in the note that the consideration is for services rendered and to be rendered. And it would be necessary, in order for the plaintiff to recover, to show the rendition of the services agreed to be rendered. The note, with the endorsements thereon, lead us to think that it is a thoroughly dishonest transaction. In addition, we think there is virtually no denial of the defense set up that it has been adjudicated and that all matters between said Haley and Mrs. Ziler are included in the former action pending between said parties. The fact that Haley sets out that proceedings were pending in the Supreme Court to reverse said judgment, is not a denial to the allegations of the answer; and the further allegation in the reply that plaintiff denies every other allegation not admitted, can not be held to be a denial of the defense set up in the answer, for the reason that the allegation in the reply that proceedings are pending in the Supreme Court to reverse said judgment, must be held to be the one that applies particularly to said defense.

We are thoroughly convinced that there is no merit in plaintiff's action and for the reasons hereinbefore stated we think the judgment should be affirmed.

**Jones and Jones, JJ., concur.**

## Hamilton County Appeals.

## CORPORATIONS.

[Hamilton (1st) Court of Appeals, April 11, 1913.]

Swing, Jones and Jones, JJ.

G. A. GINTER, RECVR. v. F. J. BLAIN.

**1. Subscriber to Stock of Corporation Entitled to Determining Voice as to State for Organization.**

A subscriber to the stock of a proposed corporation is entitled to a voice in the determination of the state in which it is to be organized, and the fact that the land which it is proposed to acquire is in Kentucky raises no presumption that the company is to be a Kentucky corporation, notwithstanding the subscribers are resident of and the articles executed in Ohio.

**2. Variance Between Prospectus and Articles of Incorporation Sufficient to Release Subscriber to Stock.**

The incorporation of a company to build and operate a hotel and restaurant is such a variance from the prospectus, which stated the purpose to be to build and possibly furnish a hotel, as to relieve a subscriber to the stock under the prospectus from liability to make payment therefor.

**ERROR.**

*Ireton & Schoenle*, for plaintiff in error.

*J. L. Kohl*, for defendant in error.

**JONES, O. B., J.**

This is an action on account claimed to be due for an unpaid subscription to the stock of the Blue Grass Inn Company, a corporation under the laws of Kentucky. The defendant denied that he ever became such subscriber.

The only proof offered of such subscription is found in the prospectus with its accompanying subscription list which show that it was proposed to organize the Blue Grass Inn & Hotel Company to erect a hotel on certain described property located in Campbell county, Kentucky, and sets out how the capital stock shall be constituted. Upon this list of stock subscriptions appears the name of F. J. Blain as one of the subscribers under date of May 29, 1906, the amount subscribed being \$1,000. Articles of incorporation were executed by five persons, four of

## Ginter v. Blain.

whom were among those whose names appeared on this stock subscription list, organizing a Kentucky corporation to be known as the Blue Grass Inn, and setting out that the "business to be conducted by said company is to construct and operate a hotel and restaurant." The record shows that defendant did not in any way participate in its organization and he claims to have had no knowledge of the incorporation until the receipt of the notice demanding payment of the first installment of stock subscription, when he made prompt inquiry, and on learning from the president of the company what had been done he repudiated their action and declined to have anything to do with the enterprise, and the president apparently recognizing his right to withdraw or rather to decline to go into the company, but without submitting the matter to the company or its board of directors, struck his name from the subscription list, and it appears no further calls were made on him until after the receivership. But defendant does not rely on such release.

We do not believe the facts shown make defendant liable as a subscriber to the stock of the company as organized. His proposal according to the prospectors was to take \$1,000—in stock (cumulative preferred) at 90 cents on the dollar with an additional 20 per cent of the par value of this subscription in common stock as a bonus. In what state the corporation was to be organized had not been determined. The laws differ widely in the different states. The defendant was entitled to a voice in this matter. It can not be said that because the land was in Kentucky, the corporation must be necessarily organized in Kentucky. The articles were executed in Ohio, where most of the subscribers resided, and it might as well be claimed, therefore, that it was understood that it should be organized under the laws of Ohio.

The company described in the prospectus was for the purpose of erecting the hotel, possibly to build and furnish it. The company as organized was not only to construct but also to operate the hotel and a restaurant as well. This would be such a variance from the terms of the original proposal that it would

## Hamilton County Appeals.

require the consent of defendant either actual or implied to hold him. *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145 [73 N. E. Rep. 674]; *Greenbrier Industrial Exposition v. Rodes*, 37 W. Va. 738 [17 S. E. Rep. 819]; Cook, Corporations Secs. 62 and 194.

Counsel for plaintiff in error criticise the distinction made by the court below in the charge between preferred stock and cumulative preferred stock, and argue that the rules and regulations adopted by the shareholders rather than the articles of incorporation fix such provisions. Section 564 of the Revised Statutes of Kentucky (which was introduced in evidence but is not contained in the bill of exceptions) undoubtedly does authorize the corporation by appropriate action to provide for cumulative preferred stock, but no such action by the directors or the stockholders appears in the record.

Other errors are also pointed out by counsel for plaintiff in error but, holding as we do that defendant was not a subscriber to the stock of the Blue Grass Inn Company as organized, it is not necessary to consider them, as they can be in no way prejudicial to plaintiff.

Judgment affirmed.

Swing and Jones, E. H., JJ., concur.



Dever v. Engineering Co.

### CONTRACTS—CORPORATIONS.

[Knox (5th) Court of Appeals, October 22, 1915.]

Shields, Powell and Houck, JJ.

\*ED. DEVER v. REEVES ENGINEERING CO.

**Agreement by which Preferred Stockholders Remit Dividends and Common Stockholders Promise to Pay Assessments on Stock Held Mutual and of Good and Sufficient Consideration.**

An agreement by stockholders of all common and preferred stock of an Ohio corporation "in consideration of the mutual promises of each other and of the benefits to accrue to each," the preferred agreeing "to excuse and remit" certain dividends, and the common "to pay \* \* \* \$40 per share upon the number of shares set beside our respective names," does not fail for want of mutuality or lack of good and sufficient consideration to sustain and support it; such agreement is not in conflict with the statutes and may be enforced in the name of the corporation.

[Syllabus approved by the court.]

ERROR.

*L. C. Stillwell* and *C. L. Bermont*, for plaintiff in error.

*Henry C. Devin* and *D. B. Grubb*, for defendant in error.

**HOUCK, J.**

This cause is here on error to the judgment of the common pleas court of this county. The action below is based on a written agreement entered into between the stockholders of the Reeves Engineering Company, whereby they agree to pay certain amounts to the treasurer of said company, for the benefits to accrue to them and said company, the amount claimed to be due from the defendant below being \$640. The petition averred that:

"Plaintiff is a corporation organized under the laws of the state of Ohio, with an authorized capital stock of 600 shares of common stock of the par value of \$100 each, and 400 shares of preferred stock of the value of \$100 each; that on or about December 15, 1910, and at the dates and times hereinafter men-

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\*Motion to certify record overruled by the Supreme Court, December 11, 1915.

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tioned, said plaintiff had issued and outstanding of its said capital stock 576 shares of the said common stock and 263 shares of said preferred stock; that on or about said date, in order to provide said corporation with additional money, the stockholders entered into a written agreement between themselves, and with said corporation, for the payment of a voluntary assessment upon the shares of common stock held by each stockholder, and the following is a copy of said agreement, to-wit:

"We, the undersigned, being all of the common and preferred stockholders of the Reeves Engineering Co. of Mt. Vernon, Ohio, in consideration of the mutual promises of each other, and of the benefits to accrue to each of us and the Reeves Engineering Co., do hereby agree as follows:

"We, the preferred stockholders, hereby agree to excuse and remit in full, receipting therefor, all dividends now accumulated or that shall accumulate prior to Jan. 1, 1911.

"We, the common stockholders, hereby agree to pay to the treasurer of the Reeves Engineering Company \$40 per share upon the number of shares set beside our respective names.

"Payments to be made as follows: 25 per cent of said amount on or before Dec. 15, 1910; 25 per cent on or before Jan. 15, 1911; 25 per cent on or before Feb. 15, 1911, and the entire balance on or before March 15, 1911."

"Plaintiff further says that said agreement was signed by the owner and holder of each and all of the issued and outstanding stock of said corporation; that at said time the said defendant, Ed. Dever, was the owner and holder of sixteen shares of the said issued common stock of said corporation, and that on or about said date said defendant, for the consideration therein set forth, did sign his name to said agreement, and did set beside his said name the number sixteen to indicate the number of shares of said stock so owned and held by him.

"Plaintiff further says that said agreement was accepted by the board of directors of said company, and the subscription thereunder called for; that said defendant was duly noti-

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fied thereof, and requested to make payment to the treasurer of plaintiff of the several installments due thereunder, which said defendant refused and neglected to do, and has ever since refused and neglected to pay the said amount of \$40 per share upon the number of shares set beside his name, or any part thereof.

"Plaintiff further says that it has duly performed all the obligations and conditions upon its part to be performed, and there is now due and owing to said plaintiff from said defendant, upon said defendant's agreement hereinabove set forth, the sum of \$640, with interest at 6 per cent per annum from the first day of August, 1911," and prays judgment, etc.

The defendant filed an answer denying all the material allegations of the petition, and specifically averring that notwithstanding he signed said paper writing that it was without consideration moving either to him or the said the Reeves Engineering Company, and that said company did not own the claim upon which suit is brought.

A reply in the nature of a general denial was filed to the answer; the cause was tried to a jury, and a verdict returned for the full amount, with interest, and judgment rendered upon the verdict. The judgment is sought to be reversed for the following reasons:

First, that the statutes of Ohio do not authorize a recovery upon such an agreement as the one upon which the suit at bar is based.

Second, that the plaintiff below did not own the claim upon which suit was brought.

Third, the contract of agreement is not founded upon a good, valid, or sufficient consideration, and is without any consideration to support it.

From an examination of the statutes of Ohio and the record in this case we are fully satisfied that the alleged errors numbers one and two are not well taken, and should be overruled, and the same is hereby accordingly done.

The real question presented for the determination of the court appears to us to be, Is the paper writing sued upon a

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contract in substance and in fact, with a good and sufficient consideration to support it, or is there any consideration for it? If this is answered in the affirmative then the judgment should stand; but if in the negative it must fall. Can it be claimed with any degree of assurance, after an examination of the contract, that the plain language contained therein does not state a consideration? It certainly does not fall for lack of mutuality, and as mutuality is essential to the validity of at least an executory contract the law certainly presumes an intent to create mutual obligation except in cases where the expressed agreement will not admit of that interpretation. From the nature of the agreement what is the reciprocity between the parties? The plaintiff in error was the owner of sixteen shares of the common stock of the Reeves Engineering Company, and there were many others who owned stock, and also a number who owned preferred stock. The company needed more money to conduct its business, and the preferred stockholders said in the agreement, "We hereby agree to excuse and remit in full, receipting therefor, all dividends now accumulated or that shall accumulate prior to January 1, 1911." The common stockholders said in the agreement, "We hereby agree to pay to the treasurer of the Reeves Engineering Company \$40 per share upon the number of shares set beside our respective names." This was a promise for a promise, and when carried into effect, which was done by all of the stockholders except the plaintiff in error and two others, enhanced the value and increased the assets of the company, and thereby inured to the benefit of all the stockholders, including the plaintiff in error and the company, which was fully intended by the language of the agreement, namely: "We, the undersigned, being all of the common and preferred stockholders of the Reeves Engineering Company, of Mt. Vernon, Ohio, in consideration of the mutual promises of each other, and of the benefits to accrue to each of us and the Reeves Engineering Company, do \* \* \*."

What were the benefits to be derived? The payment on the contract would and did increase the value and assets of the company. The co-stockholders with plaintiff in error con-

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tributed their part, as provided for and agreed to by them in said written agreement, which was all they had agreed to do or could do, and which thereby enhanced and enlarged the assets of the company, which inured to the benefit of the plaintiff in error as well as the company, and which was the ultimate object of the contract. From an examination of the language of the instrument it is apparent that the parties thereto intended to make a contract—a binding obligation—and every line precludes the idea that it was not intended to be binding upon the parties thereto and of full force and effect in law.

We think the doctrine laid down in the case of *Sterling Wrench Co. v. Amstutz*, 50 Ohio St. 484 [34 N. E. Rep. 794], first paragraph of the syllabus, is applicable to this case:

“An agreement entered into by solvent shareholders of an embarrassed corporation, that they will severally contribute to raise a fund to pay the corporate liabilities, creates a valid obligation; and, if the share to be contributed by each is not expressly fixed by the terms of the agreement, each should contribute in the proportion that the number of shares of stock owned by him bears to the shares held by all the contributors.”

The record discloses that all of the stockholders except the plaintiff in error and two or three others have paid the several amounts agreed by them to be paid under said contract, and that full performance by all of the contracting parties of their obligations under the contract have been met by them. In the face of this fact and the plain language of the contract, which to our mind is founded upon a good and valuable consideration, is it proper and right under the facts and the law that the plaintiff in error should not be compelled to comply with his agreement and the terms of the contract as entered into by him? We think not. A majority of the court is of the opinion that the judgment below is right and should be affirmed.

**Shields, J.**, concurs.

**Powell, J.**, dissents.

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## BANKS AND BANKING.

[Hamilton (1st) Court of Appeals, October Term, 1914.]

Swing, Jones and Jones, JJ.

(Swing, J., not sitting.)

**\*SECOND NAT. BANK V. AMY R. CAMPBELL.****Bank Negligent In Executing Draft Raised to Larger Amount Without Exciting Suspicion.**

Whether a draft which had been "raised" and was accepted for the larger amount, had been so negligently drawn as to make the issuing bank liable for the full amount by reason of the fact that the alteration was possible without exciting the suspicion of a reasonably careful man, is a question for the jury, and an unequivocal finding as to such negligence will not be disturbed by a reviewing court.

*Charles B. Wilby*, for plaintiff in error.

*Charles W. Baker*, for defendant in error.

**JONES, E. H., J.**

This action was originally brought by Amy R. Campbell against the Second National Bank of Vincennes, praying for judgment for \$360 upon a draft drawn by said bank, which she cashed for the payee.

The draft when tendered to her was in the sum of \$360. She accepted it in payment of a tuition fee of \$100, and paid the difference to the prospective pupil of her business college in cash. She recovered judgment below against the bank for \$260 with interest, the evidence showing that she really never parted with the remaining consideration, the matriculation in the college being only a ruse by which Miss Campbell was induced to honor the draft.

The judgment below in favor of the defendant in error rests upon the allegations of the second cause of action of her amended petition, which are as follows:

"Plaintiff says that defendant is a corporation under the laws of United States, and is and was doing banking business at Vincennes, Indiana.

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Motion to certify record overruled, *Second National Bank v. Campbell*, 60 Bull 40.

## Bank v. Campbell.

"Plaintiff says that on the 27th day of September, 1910, at Vincennes, Indiana, the defendant drew a draft on the Fort Dearborn National Bank of Chicago, Illinois, and delivered it to a man purporting to be one E. J. Andrews. That said draft was on the usual forms used by the defendant in drawing such drafts; was made payable to the order of one M. J. Andrews, and this plaintiff is advised that the defendant claims that the said original draft was drawn for \$3.00 only.

"Plaintiff says, however, that the said draft was so negligently and unskillfully drawn and made out as that it permitted its alteration without detection, and whatever was the amount of the original draft it was so carelessly and negligently drawn and written in and made out, and without the usual safe-guards ordinarily used in connection with the drawing of such drafts, that the said draft was susceptible of being altered without detection, and it was so altered by the said M. J. Andrews, or some one for him, so that the said draft came to be in the following form and shape:

"The Second National Bank of Vincennes,

"Vincennes, Indiana, Sep. 27, 1910, No. 25296.

"Pay to the order of M. J. Andrews .....\$360.00  
three hundred sixty & No 100 .....dollars.

To Ft. Dearborn National Bank,  
Chicago, Ill.

J. T. Boyd, Cashier.

Not over five hundred dollars.

"Endorsed M. J. ANDREWS,

"A. R. CAMPBELL,

"Paid through Chicago Clearing House,

"Oct. 1, 1910.

"Mail.

"First National Bank, -

"Pay First National Bank, Chicago, Ill.  
or order,

"Prior endorsements guaranteed,

"FOURTH NATIONAL BANK, Cincinnati, O.

"CHARLES BARTLESS, Cashier.

## Hamilton County Appeals.

"Plaintiff says that, believing said draft to be genuine and for three hundred and sixty (\$360) dollars and the said M. J. Andrews having endorsed the same, as did this plaintiff, she deposited it for collection in the bank in Cincinnati, where she kept her account; but the said draft was refused payment by the Second National Bank of Vincennes, which said bank now claims that it never issued said draft for the said sum of three hundred and sixty (\$360) dollars.

"Plaintiff says that, by reason of the carelessness and negligence of the defendant company, the drawer of said draft, in drawing a draft that was so carelessly and negligently drawn that it could be altered and changed without detection, she was deceived into taking said draft and giving its equivalent as aforesaid, all to her damage in the sum of three hundred and sixty (\$360) dollars, and without fault upon her part."

These allegations were denied in the amended answer in which it is averred that "the draft was carefully drawn and protected by the use of the Todd protectograph, a device in use by most banks for the prevention of alteration of checks, which is the best device for that purpose known to bankers, and is the safeguard most commonly used in connection with the drawing of such drafts, and that said draft was altered without fault on its part."

Thus, the issue of the care or want of care by the bank in drawing the draft, was made by the pleadings in the case. The jury had that one question before it for determination; and in addition to their general verdict the jurors were required to answer certain interrogatories propounded by the defendant below. The interrogatories and answers are as follows:

"1. Was the bank negligent in drawing and issuing that draft?

"Answer: Yes. L. H. BATES, Foreman.

"2. If your foregoing answer shall be 'yes' then state in what respect the bank was negligent.

"Answer: By not having used the necessary precaution, to-wit: the evidence produced in this case showing the draft marked 'Exhibit A' in its present appearance to us does not



**Bank v. Campbell.**

show that same was stamped more than once by the protectograph device and that the draft does show it was stamped at least once, 'Not over five hundred dollars' by the above named device, upon this evidence and testimony given that this device was used by the defendant in issuing the draft they in our opinion were guilty of negligently preparing the draft in question.

"L. H. BATES, Foreman."

It is claimed however, that this finding of the jury is not supported by the evidence, and in support of this contention this court has been provided with two magnifying glasses and a Todd protectograph in an effort to show that there has been a change in the protectograph impression on the draft since it was issued by the bank, and that the jury was mistaken in finding to the contrary. These aids in the determination of the issue, together with the draft, were in possession of the jury during its deliberations. Their clear and unequivocal answer to the second interrogatory amply supports the allegation of the amended petition as quoted above, and leaves no doubt as to the position of the jury upon this simple yet important question of fact. We are not aware of any law or rule which would authorize this or any other court to interfere with this finding of fact by the jury, unless it was manifestly against the weight of the evidence. A great many witnesses were called to testify upon the point upon which the jury passed, but after all, the principal item of evidence is the draft itself. While its appearance satisfied some of the witnesses that the first protectograph stamping had been changed, there was a conflict, even among the witnesses upon this point. All possible assistance was rendered the jury in determining this issue. From its verdict there is no appeal. It would be a palpable usurpation of the province of the jury for a court to interfere.

The questions of law involved in this controversy have apparently not often arisen, especially in our state. The judgment against the bank, assuming the facts to be as found by the jury, was warranted by the law as well stated in 2 Daniel, Neg. Instru. (6 ed.) Sec. 1405:

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"When the drawer of the bill or maker of note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it. The true principle applicable to such cases is that the party who puts his paper in circulation, invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none. It is the duty of the maker of the note to guard not only himself but the public, against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease and without ready detection. The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration."

See also: *Johnston Harvester Co. v. McLean*, 57 Wis. 258 [15 N. W. Rep. 177; 46 Am. Rep. 39]; *Garrard v. Hadden*, 67 Pa. St. 82 [5 Am. Rep. 412]; *Zimmerman v. Rote*, 75 Pa. St. 188; *Brown v. Reed*, 79 Pa. St. 370 [21 Am. Rep. 75].

The fifth paragraph in the syllabus of the last case cited is authority for the claim that the issue that we have here is one for the jury. It reads as follows:

"The paper in this case was part of a contract so skillfully arranged that if the portion on the right end were cut off there would be left a negotiable note. *Held*: That whether there was negligence in the maker in executing such paper, was for the jury."

We find no error in the record to the prejudice of plaintiff in error, and the judgment will therefore be affirmed.

Jones, O. B., J., concurs.

Evans v. Comins.

## BILLS, NOTES AND CHECKS.

[Scioto (4th) Court of Appeals, December 18, 1914.]

Jones, Walters and Sayre, JJ.

\*ELIZABETH EVANS, EXRX. V. KATE COMINS ET AL.

1. Promise by Indorser to Collect Notes is Waiver of Notice of Dishonor.

An indorser of a negotiable instrument who, before the time for presentment, agrees with the holder that he will collect the principal sum evidenced by said instrument and the interest due thereon, thereby waives notice of dishonor.

2. Holders Relieved from Making Demand and Giving Notice of Dishonor.

An indorser of a negotiable instrument who, for eight or ten years has sold and delivered such instruments to the holders and has always collected the principal and interest due thereon, can not take advantage of the failure of such holders to make demand and give notice of dishonor to him, after such course of conduct, although he did not expressly agree to undertake the collection of the note in controversy.

### ERROR.

August 3, 1911, Hester Ann Copeland and Arthur J. Copeland executed and delivered to Nelson W. Evans their five promissory notes, for \$500 each, payable to him one year after date. Before the end of August, 1911, Nelson W. Evans, for a full and valuable consideration, sold and delivered two of the notes to Alice and Kate Comins, and signed his name on the back of each note. The notes contained no waiver of protest. Presentment for payment was never made or attempted, and notice of dishonor was never given to the indorser, Nelson W. Evans, who died May 27, 1913. Kate and Alice Comins claim that notice of dishonor was waived by the indorser, as appears by the testimony of their mother, which was undisputed and is as follows:

"Q. State your name, age, and residence? A. Ann Comins; aged 85; No. 1148 Gallia street, Portsmouth, Ohio.

"Q. Were you acquainted with Captain N. W. Evans

## Scioto County Appeals.

during his lifetime? A. Yes, I have known him for 35 years; probably longer.

"Q. How close did you live to him? A. Next door but one for about the past eight years. We have always been friendly.

"Q. Did he come to your house; and if so, how frequently during that time? A. He came nearly every week or so.

"Q. What relation are you to Alice and Kate Comins? A. Their mother.

"Q. Did Captain Evans and your two daughters, Alice and Kate, have any business transactions together? A. Yes; we used to think that whatever Mr. Evans did was all right.

"Q. What were these business transactions? A. He would bring notes to them and sell them to them, and attend to collecting the interest and the notes.

"Q. Did the girls look after any of these notes that he sold them, or did Captain Evans? A. They let him have the care of them, always.

"Q. Do you know whether or not that he let them have a couple of notes given by Hester Ann Copeland and Arthur J. Copeland, dated August 3, 1911, for \$500 each? A. I think I heard him talking about these notes, and he told them that they were on a farm and that they were as good as gold.

"Q. Was there anything said about who would look after these notes? A. He said he would look after them.

"Q. I'll ask you whether or not he did bring any interest here on the notes? A. I think he did.

"Q. How long were these business transactions about the notes between Captain Evans and the girls? How long back was he indorsing these notes, collecting the interest and looking after them for the girls? A. As much as eight or ten years, probably more than that.

"Q. How near to the time of his death was he over here, talking about the Copeland notes? A. Not longer than three or four weeks before his death.

"Q. What did he say the last time he was over here, talking about the Copeland notes? A. He said they were on a farm, and that they were as good as gold, and I asked him who

## Evans v. Comins.

this Copeland was. He said, 'He is a farmer, and as good as gold,' and he says, 'I'll attend to them and look after the notes.'

"Q. Did the girls ever look after any notes that Captain Evans ever indorsed to them? A. He did all the collecting.

"Q. Where would he give them the money? A. Here at the house, and some he sent by check through the mail.

"Q. Did the people that these notes are on, did the girls go and see them? A. I don't think they did. We always had confidence, we never questioned. Captain Evans looked after it.

"Q. You have said that they were dealing in notes with him for the past eight or ten years. I'll ask you that if during that entire time they held notes that he had sold them? A. Yes.

"Q. Is it or is it not a fact that he had practically entire charge of their money in this way? A. Nearly all of it."

The court below held that notice of dishonor was waived.

*E. G. Millar and Jos. T. Micklethwaite*, for plaintiff in error.

*Blair & Kimball*, for defendants in error.

## SAYRE, J.

Section 8214 provides that notice of dishonor may be waived expressly or by implication.

Waiver of demand and notice must be clearly shown. *Second Nat. Bank v. McGuire*, 33 Ohio St. 295 [31 Am. Rep. 539].

The necessity to give notice of dishonor is dispensed with by such conduct on the part of the indorser toward the holder of negotiable paper as is calculated to put a person of reasonable prudence off his guard or to induce him to omit to give such notice. *Boyd v. Bank*, 32 Ohio St. 526 [30 Am. Rep. 624].

It appears from the testimony that Nelson W. Evans, for several years, had been selling notes to Kate and Alice Comins and attending to the collection of the principal and interest, and that he said he would look after these particular notes. However, it does not clearly appear, when he said he would look after the Copeland notes, whether it was before maturity

## Scioto County Appeals.

or afterward, as the last conversation in which he said he would look after them was some time after the notes were due. It is not clear that Nelson W. Evans, before the time when demand and notice should have been given, agreed to look after the collection of these particular notes; but from the long course of similar transactions, in negotiating notes to Kate and Alice Comins and collecting the principal and interest, they clearly had a right to expect that he would undertake the collection of the Copeland notes. By such conduct and without notice to the contrary, he did undertake to "look after the notes." His promise to collect the notes is clearly implied from the situation of the parties, as shown by the evidence of Ann Comins. He thereby took upon himself the duty of collecting the notes, which included the duty to take the necessary steps required by law to make an indorser liable. He thereby relieved the holders from the duty to make demand and give notice of dishonor. It became his duty to do what the law required Kate and Alice Comins to do, that is, to make demand and give notice of dishonor. If he had made demand, as he was bound to do under his arrangement with them, he would have had notice of dishonor. If he did not receive such notice it was because he did not do his duty. So that neither he, nor his estate, could take advantage of his failure to do his duty. By taking upon himself the duty to collect the notes he clearly waived notice of dishonor. *Torbert v. Montague*, 87 Pac. Rep. 1145 (Cal.); *Bryant v. Wilcox*, 49 Cal. 47.

The judgment will be affirmed.

Jones and Walters, JJ., concur.

Traction Co. v. Thompson.

### STREET RAILWAYS.

[Hamilton (1st) Court of Appeals, February 5, 1915.]

Swing, Jones and Jones, JJ.

CINCINNATI TRAC. CO. v. MARY THOMPSON.

**Pedestrian at a Street Crossing Negligently Stepping on a Greasy Rail, Causing Fall and Injuries, Denied Recovery.**

A young lady, familiar with a street crossing and with the fact that the rails laid on a curve were sometimes greased, attempting to cross at a time when the street was clear and the grease could easily have been discovered, falling to look where she was stepping, and as a consequence slips on the greasy rail, falling and being injured, is not entitled to recover therefor. Cincinnati Trac. Co. v. Cramer, 31 O. C. C. 576 (12 N. S. 315), distinguished.

#### ERROR.

*Miller Outcalt*, for plaintiff in error.

*Spangenberg & Spangenberg* and *Thomas L. Michie*, for defendant in error.

#### SWING, J.

This cause is in this court on error to the judgment of the superior court of Cincinnati, in which court said Mary Thompson recovered a judgment against the traction company for the sum of \$2,034 on December 4, 1913, for personal injuries caused by slipping and falling on the rails of the traction company at the northwest corner of Fifth street and Central avenue, in the city of Cincinnati.

The allegations of negligence charged in the petition are as follows:

“Plaintiff says that defendant wrongfully and negligently placed and caused to be placed, and allowed to remain, a large and unnecessary quantity of grease, oil and pitch upon its said south rail at the said street intersection, whereby it became and was then and there dangerous to the public using and crossing the said rail in this, to-wit: that the said rail was made slippery by the said large and unnecessary accumulation of grease, oil

## Hamilton County Appeals.

and pitch which the defendant had placed and allowed to remain upon its said south rail at the east crossing of the said Central avenue over the said Fifth avenue, whereby the plaintiff as she stepped upon the south rail then and there slipped and was caused to fall."

There is no conflict in the testimony, and there was no evidence other than plaintiff's evidence.

The evidence shows that the plaintiff below, in company with a friend, Miss Eleanon Gunlach, started across the street, as alleged in the petition, and plaintiff below was familiar with the crossing, having frequently crossed the same; that at the time of the crossing there were no vehicles or cars on the street, and the street was perfectly clear. She was a woman of good sight, and in full possession of her mental faculties. She had frequently seen these railway tracks in the street, and was familiar with this curve and rail. She knew also that it was customary for the traction company to apply grease to the tracks at this curve. She testified:

"Q. You had noticed it (grease in the tracks) before?

A. Many a time. Anybody could notice that grease.

"Q. You knew grease was slippery? A. Certainly.

"Q. You knew if you stepped upon grease you were likely to fall; that is true? A. Yes, sir."

She testified that the grease was easily discernible and that it was very black and different in color from the rest of the street at the point where it was placed. She was asked this question:

"Q. The question is: why didn't you look, on this occasion, when you came to that curve, that switch? A. I was crossing over on the crossing. I seen the road was clear. There was nothing coming, at all. I was right on that flagging, and there was nothing in front of me, and of course I put my foot right down there, and it went partly on the tracks and the other part on the flagging, and the grease slipped me; and that is how I fell.

\* \* \* \* \*



## Traction Co. v. Thompson.

"Q. You say that you didn't look? A. Not at that particular point.

"Q. So you knew it was likely there might be grease in the curve that morning? A. Yes, sir."

Then again:

"A. If I knew it was there I could see it; knowing and looking I could not miss it."

\* \* \* \* \*

"Q. If you had been looking to see, there would have been no difficulty in your stepping over it? A. No sir, there would not be if I had looked to see."

The witness Eleanor Gunlach testified:

"A. We were not paying no attention just at the time on the track."

She also testified that the grease was so black that it was different in color from the rest of the street. She further testified:

"Q. If it was on the street, if you looked you would have seen it? A. Yes, sir."

There was no evidence which tended to show any negligence on the part of the traction company in greasing tracks at this point, unless it be found in the statement that there was too large an amount of grease placed on the track at this particular point. The witness testified that there was a quart or more, but whether this amount was in excess of what should have been placed there is not shown by the evidence. But whether it be so or not, it is not shown that the excessive amount of grease placed upon the track was the cause of the injury.

The traction company at the close of the evidence moved the court to direct a verdict for the defendant company, which motion the court overruled, and afterwards entered judgment on the verdict.

The facts being undisputed, it became a question of law for the court, provided these facts failed to show any negligence on the part of the traction company, or showed that the injury was caused by the negligence of the plaintiff as shown by her

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own testimony. We are of the opinion that the injury was caused by the negligence of the plaintiff herself in not using the ordinary care and prudence that persons are accustomed to use when crossing a street. It is clear that if she had looked she could have seen this grease upon the track, and could easily have avoided it. But she knew it was likely to be there, and she knew that if it was there and she stepped on it she was liable to slip. Knowing these facts, she paid no attention to it, and deliberately stepped upon the rail and received the injury. From these undisputed facts it seems clear that the plaintiff in error was not entitled to recover.

We have been referred to the case of *Cincinnati Trac. Co. v. Cramer*, 31 O. C. C. 576 (12 N. S. 315), as a case directly in point, and controlling upon this court in support of the contention of the plaintiff below in this case. The case is somewhat similar, and the syllabus as well as the opinion of the court would seem to bear out the contention of the plaintiff below in being decisive of the question raised here, as that case was decided by this court. But the facts in that case as shown by the record, were different from the facts here, and the decision should go no further than its application to the facts of the case. In that case the traction company had placed a large quantity of grease outside of its tracks on the crossing, and the dust and dirt had covered that grease so as to obscure its presence and it was upon this that the plaintiff in that case stepped, and not upon the track of the company. Whereas in this case the plaintiff's allegation was that the grease was placed upon the track of the company, and that she stepped upon the grease on the tracks of the company. The facts being different, we do not think that we are bound by the decision in that case.

The judgment will be reversed, and judgment entered in this court for plaintiff in error.

Jones and Jones, JJ., concur.

Traction Co. v. Thompson.

## CRIMINAL LAW.

[Darke (2nd) Court of Appeals, January, 1915.]

Swing, Jones and Jones, JJ.

J. E. STEPHENSON v. STATE OF OHIO.

**Incompetency of Accused Defending Without Counsel Being Shown,  
Held no Trial.**

Where a defendant in a criminal case states that he does not desire counsel, and attempts to conduct the defense himself, and it becomes evident that he is mentally incapable of so doing, or understanding the nature of the defense, it becomes the duty of the court to stop the trial and appoint counsel to defend; and where this is not done, and the trial results in the conviction and sentence of the defendant, a reviewing court will reverse the judgment on the ground that virtually there was no trial.

### ERROR.

*D. E. Mote and Robert T. Mattingly*, for plaintiff in error.

*L. E. Kerlin and J. H. Porter*, Pros. Attys., for defendant in error.

### SWING, J.

This case is here on error to the judgment of the court of common pleas of Darke county, and by consent of parties it was heard by the court of appeals of the first district of Ohio. The case was submitted and argued on briefs, but the court after considering the briefs and the record requested oral argument, which was had.

On September 16, 1914, plaintiff in error was convicted upon a charge of embezzlement, and was sentenced to the penitentiary for a term of two years.

This case is *sui generis*. It was tried by the prosecuting attorney of Darke county representing the state, and the defendant representing himself. Before the trial defendant asked the court to appoint counsel to defend him, and the court thereupon selected one Theodore Shockney, a member of the bar of said county. When the case came on for trial said attorney re-

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fused to act as counsel, and the record shows that the defendant not asking or desiring counsel, the case proceeded to trial, the defendant representing himself.

We think that the record shows that there was really no trial, so far as the defendant was concerned. It is quite evident that at the time of the trial the defendant was mentally incapable of comprehending the nature of his defense, and we think this fact must have been apparent to the court at the time. While defendant seems to have thought he was making a defense still it was really no defense, and, realizing this fact, we think the judge should have stopped the trial of the case and appointed some counsel to defend, so that the trial might have been properly carried on. We think that the law contemplates that a defendant should have a fair trial. The record in this case virtually shows that there was no trial, so far as the defense was concerned. Upon this broad ground we think the judgment should be reversed and a new trial granted.

Jones, E. H., J., concurs.

Jones, O. B., J., dissents.

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INSURANCE.

[Hamilton (1st) Court of Appeals, June 30, 1914.]

Swing, Jones and Jones, JJ.

**METROPOLITAN LIFE INS. CO. v. OBERST BURBANK, ADMR.**

**Facility of Payment Methods Upheld as to Industrial Policies.**

Owing to the great volume of insurance done by industrial insurance companies and the necessity for prompt settlement in order to efficiently carry out the purpose of insurance of that class, and also for the protection of the companies against claims which might develop during the course of the legal administration of the estates involved, facility of payment provisions contained in such policies should be regarded with favor; hence, where it appears that payment was made strictly within the terms of the policy and in good faith on the part of the company and the proceeds were applied to payment of the funeral expenses and an unpaid board bill of the decedent, an action cannot be maintained against the insurance company for the proceeds of the policy by the administrator of the insured.

## Insurance Co. v. Burbank.

## ERROR.

*Robertson & Buchwalter and Theodore C. Jung*, for plaintiff in error.

*William R. Collins*, for defendant in error.

## JONES, O. B., J.

The action below was brought by Oberst Burbank, as administrator of James A. Mulvey, deceased, to recover \$210 with interest and for an accounting, under a policy No. 42,660,077 issued by the Metropolitan Life Insurance Company upon the life of James Mulvey, November 8, 1909, then twenty years of age, on the payment of weekly premiums of ten cents.

The language of the policy contained the following facility of payment clause:

"The company may pay the amount due under this policy to either the beneficiary named below, or to the executor or administrator, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons shall be conclusive evidence that all claims under this policy have been satisfied."

And for the purpose of naming the beneficiary and the relationship or situation he bore to the insured it contained the following language:

"Name of beneficiary and relationship to the insured, Geo. Loyd—Guardian."

The Metropolitan Life Insurance Company, as defendant, admitted the making of the policy and the death of the insured, and pleaded the payment of the entire amount due to George Loyd as the beneficiary named in the policy, and to one Mary E. Snider, who had united with said George Loyd in surrendering the policy of insurance and all the receipt books, and who claimed that the policy of insurance had been given to her by the insured as security for the payment of a board bill due and owing from him to said Mary Snider. It further stated

## Hamilton County Appeals.

that said George Loyd furnished proof that he was the beneficiary named in said policy of insurance, and that he and his wife had raised and brought up the said James A. Mulvey to the age of fourteen years and provided for his necessary wants. And it further stated that said George Loyd furnished proof to said company that he had incurred expense for the burial of said insured, and that the company had issued its check, which was duly paid, for the entire proceeds of said policy of insurance amounting to \$210.40 to the joint order of George Loyd and Mary E. Snider, and that said check was paid to said parties.

Upon trial it developed that the insurance company had made payment, in accordance with the allegations of its answer, before any claim had been made upon it by plaintiff or any other claimant under said policy.

On submission to the jury a verdict was rendered in behalf of the plaintiff for \$100.10, upon which a judgment was afterwards entered. Error is prosecuted in this court for the purpose of setting aside such judgment.

From a careful examination of the record it appears that after the death of the insured proof of claim was promptly filed with the company by George Loyd as the beneficiary named in the policy, and that Mary E. Snider, who has possession of the insurance policy and receipts, also claimed some interest therein on account of money due her from the deceased. Upon investigation by the insurance company the entire amount due under the policy was paid under a check drawn by said company in favor of George Loyd and Mary E. Snider. Out of this check the entire funeral expenses were paid to the undertaker, and the balance of the money was divided in a manner satisfactory to the parties between said George Loyd and Mary E. Snider.

Defendant in error concedes that if George Lloyd had been actually the legal guardian of James A. Mulvey, plaintiff could not maintain the suit. We do not understand that the statement in the policy showing "Name of beneficiary and the relationship to the insured" as "Geo. Loyd—Guardian" should be

*Insurance Co. v. Burbank.*

taken to mean that George Loyd was then the legal guardian of the insured, but rather that the relationship which he bore to the insured was somewhat similar to that of a guardian, and the policy gave that as the relationship of the parties.

Industrial insurance companies because of the great volume of business done by them, evidenced in this case by the high number of the policy in question, have usually by the form of their policies provided for payments thereunder in a manner that will promote prompt settlement to carry out efficiently the purpose of such insurance and at the same time to protect the company against other claims which might develop upon a legal administration of an estate. The amounts involved are comparatively small and the benefits to be derived largely depend upon a prompt payment, as the fund is usually necessary to provide for burial and other expenses incurred upon the emergency of death.

Questions arising under payments made under the facility of payment clause of insurance policies of a similar character have been frequently brought before the courts, but because of the small amount involved they are usually found in the reports of the lower courts.

In *Thomas v. Insurance Co.* 158 Ind. 461 [63 N. E. Rep. 795], the law is thus stated:

"In *Insurance Co. v. Schaffer*, 50 N. J. Law 72 [11 Atl. Rep. 154], it was said: 'The purpose and object of this kind of insurance seemed to require the payment to be made in that way, and it should, in good policy, be upheld. Unlike the ordinary life insurance, small sums are provided by these industrial policies to be paid at once on proof of death and surrender of policy. \* \* \* The terms and manner of insurance contemplate speedy payment to the family of the assured, immediately after his death, to provide a burial fund, or to meet the expenses which, in such an emergency, must be incurred.' Before actual payment by the company to some of the persons named in article second, an action might, perhaps, be maintained by the executor, administrator, or beneficiary, for the amount named in the policy; but when such payment has

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actually been made, by the express terms of the policy it operates as a complete discharge of the company from further liability."

See also: *Thompson v. Insurance Co.* 119 App. Div. 666 [104 N. Y. Supp. 257; *Thomas v. Insurance Co.*, 148 Pa. St. 594 [24 Atl. Rep. 82]; *Wilkinson v. Insurance Co.* 63 Mo. App. 404.

Parties when not prohibited by law from so doing are at liberty to make their own contract, and within limits to provide what shall be evidence of certain facts. In this case the payment made by the company seems to have been directly within the terms of the policy. It was made to the beneficiary named in the policy upon the production of the policy and receipts for premiums paid thereunder, by him in conjunction with Mrs. Snider, who had a small claim for money advanced. The fact that the local agent of the company at the time of this payment insisted upon seeing that out of the amount so paid the undertaker's bill and the funeral expenses should be paid, and the fact that for convenience the entire check was endorsed over to the undertaker and that he gave checks for the difference, or how that difference was divided between Mr. Loyd and Mrs. Snider, or that the undertaker appeared to have made a certain discount upon the funeral bill in favor of the beneficiary, can make no difference as to the validity of the payment, which was made in strict accordance with the terms of the policy.

There is nothing in the record to show any want of good faith on the part of the insurance company nor that its action in making the payment as it did under the policy was violative of the rights of any claims that were brought to its knowledge. The motion of the defendant to arrest the cause from the jury and direct for the defendant should have been granted.

The judgment is therefore reversed and judgment entered here for plaintiff in error.

Swing and Jones, E. H., JJ., concur.



Bank Co. v. Raridon.

### CORPORATIONS—LIMITATIONS.

[Ashland (5th) Court of Appeals, November, 1915.]

Shields, Powell and Spence, JJ.

(Spence, J., of the 7th district, sitting in place of Judge Houck.)

MARBLEHEAD BANK CO. V. S. A. RARIDON.

**1. Recovery Limited to Profits Actually Made by Promoter of Corporation.**

In an action by a corporation to recover the secret profits of its promoter, the recovery is limited to the profits actually made by him in dealing with the corporations or in transactions for the corporation.

**2. Limitations for Fraud not Applicable to Action for Recovery of Secret profits by Promoter.**

In an action by a corporation to recover secret profits from its promoter, the promoter stands in a fiduciary relation to the corporation, and the action is one for a breach of duty, not for fraud, and does not come within the saving clause of the statute of limitations as an action for relief on the ground of fraud.

[Syllabus by the Court.]

ERROR.

*Mykrantz & Patterson*, for plaintiff in error.

*C. H. Workman*, for defendant in error.

**SPENCE, J.**

It is difficult to tell what theory of the case was in the mind of the pleader when the petition was drawn, but stripped of much of its useless verbiage it seems to set forth the circumstances leading up to the incorporation of the Marblehead Bank Company, and certain transactions which took place after the incorporation of the company.

The amended petition avers that the defendant, S. A. Raridon, was the promoter of the bank company and had as his associate one W. C. Pollock; that they induced certain persons to become stockholders in the bank representing to them that it would do a prosperous business in the village of Marblehead; that the banking company was incorporated under the

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laws of the state of Ohio, on March 14, 1907, and that on May 11, 1907, the defendant, Raridon, Louis St. Marie and others were elected directors, and that the stockholders or directors elected a cashier for said bank. Then the amended petition contains this averment:

"And that afterwards on May 11, 1907, the stockholders who had subscribed for stock in said company, met and organized the same by electing directors and that said defendant was present at said meeting and falsely and fraudulently represented to the stockholders and directors of plaintiff that he had purchased for the company bank fixtures including four chairs, and directors' table, one side desk, one double desk, one single desk and table, check shelves, electric fixtures, vault doors and safe, and that said fixtures were of the value of \$2,982.32—that all of the stockholders and directors of said company, aside from the defendant and the said Pollock, relied upon the representations of the defendant, in the entire organization, promotion and management of the bank at its inception."

The amended petition further avers the defendant while in charge and control of said bank caused certain certificates of stock of the cash value of \$1,000 to be issued to himself and W. C. Pollock, and that they afterwards sold and transferred said stock to other parties, and that while defendant was in charge and control of the bank he made out a "deposit slip," and caused the cashier of the bank to give him credit on a checking account for \$1,988.32, which money was later checked out of the bank by defendant, and further avers that it had no knowledge of the fact that defendant had taken a credit deposit subject to checking of \$1,988.32, for expenses, furniture and fixtures until the year 1910, and had no knowledge as to what amount had been paid by defendant for furniture and fixtures or the real value of the same as furnished by defendant until the year 1910, and avers that the bank furniture and fixtures were not worth more than \$1,000; that between May 10, 1907 and July 16, 1908, the defendant drew by check from the bank the amount of \$1,988.32, at which date he closed his

**Bank Co. v. Raridon.**

account with the bank and asks a judgment for \$1,988.32 and interest.

The petition does not aver any collusion between the defendant Raridon and the other directors of the bank, but alleges that Raridon was in charge of the bank for some time after its organization. If these allegations are true then the directors of this bank were guilty of gross negligence.

To this petition the defendant filed a demurrer, first, because the petition does not state facts sufficient to constitute a cause of action against the defendant; and second, that the cause of action is barred by the statute of limitations or the action was not brought within the time limited for the commencement of such action.

The court of common pleas sustained the second ground of the demurrer and the case is here on error to the ruling of that court.

It was the evident purpose of the pleader to set forth a cause of action for the recovery of the difference between the actual cost or price paid by defendant for the furniture and fixtures furnished by him to the bank and the amount which he received from the bank for them.

The rule is well settled as stated in 1 Clark & Marshall, Priv. Corp.:

"That the relation of promoters to the proposed corporation when formed, is a fiduciary relation, or a relation of trust and confidence and for this reason it is well settled that they will not be permitted to take advantage of their position in order to make a secret profit out of their transactions on behalf of the proposed corporation or the corporators, or out of their dealings with the corporation or corporations. If they do so, they will not be allowed to retain their advantage or gain, but the transaction may be set aside in equity or they may be compelled to account or be held liable to respond in damages."

In *Yeiser v. United States Board & Paper Co.* 107 Fed. Rep. 340, in the syllabus the court say:

"Promoters of a corporation, who become stockholders therein, assume a trust relation to the company and the other

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stockholders, which binds them to act openly and in good faith in all matters connected with its organization, and the acquiring of the property necessary for the transaction of the business for which it is organized, and they will not be permitted to make a secret profit on the sale of such property to the corporation."

These principles of law are conceded by counsel for defendant in error, and the question is whether the averments of the petition make a case for recovery under these well established rules of law. The petition alleges that defendant represented to the stockholders and directors that he had purchased the furniture, fixtures and equipment for the bank and that they "were of the value of \$2,988.32." That is not a statement or representation of a fact, but simply the expression of an opinion as to what they were worth. Waiving the form of allegation the question is not what they were worth, but what is the difference between the amount paid for them by the defendant and the amount which he received from the company for them. The averment that the furniture, fixtures and equipment of the bank were worth only \$1,000 is also the expression of an opinion as to value and does not fix the measure of recovery as the difference between that amount and the amount which the bank paid, \$2,988.32, or \$1,988.32.

In *Loudenslager v. Woodbury*, 58 N. J. Eq. 556 [43 Atl. Rep. 671], it is said:

"To go beyond restitution and decree the actual payment of a sum of money never received by the defendant by way of profit or otherwise, is to impose a penalty of a sort and in a fashion unknown to courts of equity, aside from causes of actual fraud."

The rule is so well recognized that it would be idle to cite authorities to show that the amount which a corporation is entitled to receive from a promoter is the profits which he actually received in dealing with or for the corporation; in other words, his secret profit.

Speaking for myself alone, I do not think that the amended petition states facts sufficient to constitute a cause of action against the defendant and that the first ground of the

*Bank Co. v. Raridon.*

demurrer should have been sustained by the common pleas court.

Counsel for plaintiff in error contend that this action is one for relief on the ground of fraud, and that the action was begun within four years after the discovery of the fraud, the amended petition avers that the bank company is a corporation incorporated under the laws of Ohio; that on May 11, 1907, the stockholders organized by electing a board of directors and a cashier for said bank; that the defendant was present at said meeting and falsely and fraudulently represented to the stockholders and directors of plaintiff company that he had purchased for the company bank fixtures, enumerating them, and that "said fixtures were of the value of \$2,988.32." Then follows a statement in regard to the defendant depositing \$1,600 and withdrawing the same. This seemed to be his private funds and we are unable to see how it is connected with this case, but following these statements is this allegation:

"Plaintiff further avers that it had no knowledge nor did any of its directors or stockholders, except the said defendant and the said Pollock, have any knowledge of the fraudulent transaction of the defendant or had any knowledge that the representations made by him were fraudulent and false until in the year 1910."

Assuming that the petition sets forth a cause of action for relief on the ground of fraud, that the cause of action accrued was not discovered until within four years of the time the action was begun, such allegation would be good as against a demurrer. *Zieverink v. Kemper*, 50 Ohio St. 208 [34 N. E. Rep. 250], in the syllabus, the court say:

"When it appears from plaintiff's petition in an action for relief on the ground of fraud, that the cause of action accrued more than four years before the action was commenced, a general averment in the petition, that the fraud was not discovered by plaintiff until a time within four years before the action was brought, is sufficient to bring the case within the saving clause of the statute of limitations for such actions, without specifically setting out when the discovery was made, or how it was made or why it was not made sooner."

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We come now to the question as to whether this is an action for relief on the ground of fraud and comes within the saving clause of the statute which provides that the cause of action shall not accrue until the fraud is discovered. In *Carpenter v. Canal Co.* 35 Ohio St. 307, 316, Okey, J., says:

“These sections (now Sec. 11224 G. C.) extended to cases of an equitable as well as those of a legal nature.”

Waiving all questions as to the anomalous petition and assuming that it makes a cause of action for the recovery of the secret profits of a promoter, is such an action one for relief on the ground of fraud or is it one of breach of duty on the part of the promoter?

The petition alleges that the furniture, fixtures and equipment for the bank were sold by the defendant to the bank company on May 11, 1907, and if there was any fraud practiced by the defendant it was at the time of the sale of the furniture to the bank, and the statute of limitations would begin to run against the bank from that date, unless there has been a toll of the statute by undiscovered fraud.

In 1 Clark and Marshall, Priv. Corp. p. 325, it is said:

“To render the promoter of a corporation thus liable to account for secret profits made by him in the transactions on behalf of the corporation, it is not necessary to show that there was a fraudulent intent on his part. It is enough if the profits were made secretly, and without the consent of the corporators.”

In *Pietsch v. Milbrath*, 123 Wis. 647 [101 N. W. Rep. 388; 68 L. R. A. 945; 107 Am. St. Rep. 1017], second syllabus:

“The right of action against the promoters of a corporation to recover illegal profits made by them in buying for the corporation, at a price far in excess of its actual price, land on which they had obtained a secret option is one at law which is barred in six years from its accrual under Rev. Statutes 1808, Sec. 4222, and is not cognizable solely by a court of equity, within the exception of subdivision 7, which postpones the running of limitations until discovery of the right of action.”

Thompson, Corporations (2 ed.) Sec. 105, p. 117:

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"The liability of promoters for secret profits made by them in transactions between them and the corporation is not based on the theory of fraudulent intent on their part, but grows out of their relation to the corporation and the duty which they owe such corporation and the persons with whom they are dealing. They are clearly liable, even in the absence of fraud, on a mere failure to make full disclosures of their position and purpose. Their liability is fixed and the right to recover established when it is made to appear that such secret profits were obtained by them without the knowledge or consent of the corporation or its members. It is not so much the purpose of equity to visit him with a penalty for concealment as it is to require him to account for the profits actually made by reason of such concealment."

We have examined many other cases which bear more or less directly upon the questions here involved, but we think the cases cited are sufficient to illustrate the law as we understand its application in such cases as the one at bar. Our attention has not been called to any decisions to the contrary in this class of cases, and we have not been able to find any. We think on principle that these decisions are right. When cases are clearly within the provisions of the statutes limiting the time within which actions shall be brought, we have no power to refuse their enforcement though they may work an occasional hardship.

The judgment of the court of common pleas will be affirmed.

Shields and Powell, JJ., concur.

## Lucas County Circuit.

## INSANE PERSONS—PARTIES.

[Lucas (6th) Circuit Court, December 2, 1911.]

Wildman, Kinkade and Richards, JJ.

\*BENJAMIN F. RENO V. GEORGE R. LOVE ET AL.

**Substitution of Regularly Appointed Guardian in Action by Ward Discharged from Insane Hospital and Dismissal of Action not Prejudicial Error.**

A discharge of a person from a hospital for the insane neither vacates an order of the probate court appointing a guardian therefor, nor, in the absence of resignation or discharge affirmatively appearing of record, collaterally impeaches the order of appointment; hence, in an action by such ward in his own name to recover damages for his alleged illegal arrest and confinement, an order substituting the guardian as party plaintiff and a judgment dismissing the action do not constitute prejudicial error.

**ERROR.**

*Benjamin F. Reno*, in person.

*C. S. Northup*, for the defendants served with process except defendants Chambers and Hurlbut.

**KINKADE, J.**

Mr. Reno brought an action in the court of common pleas against a large number of defendants to recover damages for his illegal arrest and illegal confinement for over four years in the Toledo State Hospital for the insane. Some of the defendants were state officials, some were county officials and all were charged with having conspired and combined to accomplish the arrest and imprisonment mentioned.

One of the defendants filed a motion in the case asking the court to substitute Thomas Biddle, guardian of Mr. Reno, as plaintiff. This motion was heard and granted. Mr. Biddle thereupon dismissed the action. Reno objected to the substitution and dismissal of the action and preserved his exception in due form. He now files a petition in error, with bill of exceptions containing all the evidence heard on the motion, in

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\*Affirmed, no op., *Reno v. Love*, 88 O. S. 623.



## Reno v. Love.

this court to reverse the judgment of the court of common pleas in dismissing the action.

The trial court on hearing the motion had before it the affidavit of Mr. Reno and the testimony of two physicians, both of whom said Mr. Reno was insane. The trial judge stated the question of the plaintiff's sanity or insanity was not an issue on the hearing of the motion and that the only question before the court was whether the probate court of Lucas county had, before the commencement of the present action, appointed Mr. Biddle as guardian of Mr. Reno, and whether this guardianship had been terminated in any manner provided by law. Thereupon Mr. Reno, as shown by the bill of exceptions, admitted in open court that the records of the probate court of Lucas county, Ohio, did show that Mr. Biddle had been appointed by that court as his guardian prior to the filing of the petition in this case, and that said records did not show that such guardian had resigned or had been discharged by the probate court. At the same time Mr. Reno informed the trial court that the records of said probate court also showed that prior to the beginning of this action, he had been discharged from the state hospital for the insane. Thereupon the order of substitution and dismissal was made.

The plaintiff in error claims that the evidence before the trial court as shown in the bill of exceptions failed to show affirmatively that the probate court had jurisdiction over his person when the appointment of Biddle as his guardian was made and hence he was at liberty in this action, although admitting as he did that the records of the probate court did show the appointment, to treat the action of the probate court as a nullity and wholly disregard it. He further contends that even if this proposition be not correct, still his guardian was discharged by reason of his own discharge from the hospital and hence the guardianship no longer had any force.

We can not agree with either of these propositions. His discharge from the hospital could not of itself terminate the guardianship. The guardian may have been appointed on grounds other than those on which Mr. Reno was sent to the hospital but whether this be so or not, a discharge from the

## Lucas County Circuit.

hospital can not be held as vacating the order of the probate court appointing the guardian. Section 11010 G. C., which corresponds with Sec. 6311 R. S., provides the manner in which guardians may be discharged and reads as follows:

"Section 11010. When the probate judge is satisfied that an idiot, imbecile, or lunatic, or a person as to whom guardianship has been granted as such, is restored to reason, or that letters of guardianship have been improperly issued, he shall make an entry upon the journal that such guardianship terminate. Thereupon it shall cease, and the accounts of the guardian be settled by the court."

The position taken here in argument that the judgments and orders of the probate court are not attended by the presumption that the court had jurisdiction to enter them (nothing to the contrary appearing in the record) and that the judgments and orders of the probate court may be collaterally impeached, is equally untenable. The law of Ohio on this subject is clearly stated in the case of *Shroyer v. Richmond*, 16 Ohio St. 455. I quote paragraphs six and seven of the syllabus:

"6. The probate courts of this state are, in the fullest sense, courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.

7. Hence, an order appointing a guardian, made by a probate court, in the exercise of jurisdiction, can not be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it."

The Supreme Court has several times followed this decision. See *Hoffman v. Fleming*, 66 Ohio St. 163 [64 N. E. Rep. 63]; *Fisher v. Lanning*, 76 Ohio St. 189, 198 [81 N. E. Rep. 182]; *Union Sav. Bank & Tr. Co. v. Telegraph Co.* 79 Ohio St. 89, 100 [86 N. E. Rep. 478; 128 Am. St. Rep. 675].

The admission in open court by Mr. Reno as shown in the bill of exceptions fully justified the court in ordering the substitution of Biddle as plaintiff in the action. This being true,

**Farm Agency v. Creager.**

it follows there was no prejudicial error in allowing Mr. Biddle to dismiss the action. We express no opinion on any other matter involved in the action as brought. The judgment of the court of common pleas will be affirmed.

**Wildman and Richards, JJ., concur.**

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**SPECIFIC PERFORMANCE.**

[Hamilton (1st) Court of Appeals, November 8, 1915.]

**Jones, Jones and Gorman, JJ.**

**FISHER-BARKDULL FARM AGENCY V. HARRY M. CREAGER.**

**Specific Performance Denied after Conveyance of Land to Third Person of which Plaintiff had Knowledge before Suit Brought.**

Where it appears that before bringing an action for specific performance of a contract for exchange of one tract of land for another, the plaintiff had knowledge both actual and constructive of the conveyance to a third party of the land sought in exchange, a court will not retain the case for assessment of damages but will relegate the plaintiff to an action at law.

**APPEAL.**

*DeCamp & Sutphin and L. J. Brumleve, for plaintiff.*

*H. J. Buntin, for defendant.*

**JONES, O. B., J.**

This is an action to enforce the specific performance of a contract to exchange a tract of land in Cincinnati for a tract of land in Florida. The contract provided for an even exchange of the two properties.

Before this suit was filed the defendant had sold and conveyed to a bona fide purchaser all of the Cincinnati land which under said contract was to have been exchanged with plaintiff company for the Florida land. This sale was consummated and the deed of conveyance left for record with the recorder of Hamilton county, Ohio, three days before the filing of the suit, and constructive notice thereby given to plaintiff. The agent and attorney of plaintiff were both personally told by defendant that she had so sold her land, two days before the filing of

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this suit. Plaintiff therefore had both constructive and actual notice that it would be impossible for defendants to specifically perform their contract. The purchaser of the Cincinnati land is not made a party to the suit nor is any claim made that the sale was not made to him in good faith.

"Specific performance can not be decreed of an agreement to convey property which has no existence or to which the defendant has no title; and if the want of title was known to the plaintiff at the time of beginning the suit the bill will not be retained for assessment of damages." *Kennedy v. Hazelton*, 128 U. S. 667 [9 Sup. Ct. Rep. 202; 32 L. Ed. 576].

Plaintiff was fully advised before bringing this suit that defendants had conveyed away their title and that the contract could not be specifically performed. Under these circumstances the case would not be retained by the court for the assessment of damages, but must be dismissed, and plaintiff relegated to an action at law where its remedy is adequate. *Jones v. Tunis*, 99 Va. 220 [37 S. E. Rep. 841]; *Kerlin v. Knipp*, 207 Pa. St. 649 [57 Atl. Rep. 34]; *Eastman v. Reid*, 101 Ala. 320 [13 So. Rep. 46]; *Public Service Corporation v. Hackensack*, 72 N. J. Eq. 285 [64 Atl. Rep. 976]; *Mack v. McIntosh*, 181 Ill. 633 [54 N. E. Rep. 1019]; *National Tube Co. v. Tube Co.* 13-23 O. C. C. 468 (3 N. S. 459).

As the case, however, was heard on evidence and fully argued both orally and briefly, it might be stated that even if the land were still owned by defendants and subject to a decree for specific performance, that in the opinion of this court plaintiff corporation has failed to show that it would be entitled to such decree. And taking the land of plaintiff at its own valuation it would not appear that it has suffered any damage in failing to exchange it for that formerly owned by defendant.

Petition of plaintiff dismissed at its costs.

Swigerd v. Deck.

**APPEAL—EXEMPTIONS—JUDGMENTS—PLEADING.**

[Lucas (6th) Circuit Court, March 23, 1912.]

Wildman, Kinkade and Richards, JJ.

**SAMUEL C. SWIGERD ET AL. V. FRED W. DECK.**

**1. Entry Construed Personal Judgment Upon Sustaining Allegations of Cross Petition Praying Personal Judgment.**

Where the only thing sought by a cross petitioner is a personal judgment, and the court finds the allegations thereof to be true and determines that the defendant should recover from the plaintiff a specified sum on his cross petition with interest and costs, the entry will be construed to be a personal judgment.

**2. Plaintiff on Appeal from Justice Court Permitting Final Judgment Cannot Set up Claim Against Proceeding to Enforce Judgment.**

It is the duty of a plaintiff whose case has been appealed from a justice of the peace to file a petition setting forth his claim, and where he fails so to do and permits final judgment to be entered upon the claim set forth in the cross petition, it is too late for the plaintiff to set up his claim in an action thereafter brought to enforce payment of the judgment entered upon the cross petition.

**3. Property not Occupied by Parties not Subject to Homestead Exemption.**

The claim can not be maintained that property which it is sought to subject to payment of a debt is a family homestead, where it appears that the debtor and his family have not occupied the property for three or four years and during a portion of that time a contract was in existence wherein they agreed to sell the premises.

[Syllabus by the court.]

**ERROR.**

*Kohn, Northup & Morgan*, for plaintiffs in error.

*Eugene Rheinfrank*, for defendant in error.

**RICHARDS, J.**

In the court of common pleas, Fred W. Deck sued for the purpose of enforcing the payment of a judgment rendered in his favor in that court against Samuel S. Swigerd, the object of the action being to compel the sale of a house and lot and the adjustment of liens thereon.

The answer of Samuel S. Swigerd denied the allegation of

## Lucas County Circuit.

the petition that Deck had obtained a judgment against him and set up by way of cross petition a claim against Deck. The case was tried to the court and resulted in a finding and decree in favor of Deck, and to that finding and judgment this proceeding in error is prosecuted.

It appears from the record that Swigerd had sued Deck before a justice of the peace upon an account, and that Deck had filed a claim by way of set-off which, on trial to a jury in the justice court, resulted in a verdict in favor of Swigerd for a small sum. Deck appealed from the judgment rendered in the justice's court, the transcript and papers being filed and the case docketed in common pleas court on March 11, 1908. Swigerd filed no petition in the court of common pleas and upon May 21, 1909, Deck filed, no leave of court first being granted so to do, a cross petition setting up the claim which he had theretofore filed before the justice of the peace. No pleading was filed by Swigerd and the case was submitted to the court of common pleas and a judgment rendered by default in favor of Deck and against Swigerd on June 14, 1909; the journal entry reciting that the same was heard upon evidence.

The first contention of the plaintiff in error in this case is that the finding of the court, as entered in the court of common pleas, is not in fact a judgment. The entire entry, omitting the title of the case, is as follows:

"This day this cause coming on to be heard upon the cross petition of the defendant, Fred W. Deck, and the evidence, and the plaintiff being in default for answer or appearance, the court does find that the allegations of said cross petition are true and the defendant should recover from the plaintiff thereon the sum of \$161.67 together with interest from the first day of this term of court and costs."

It is insisted that the court only found the amount which the plaintiff should recover, and did not, in fact, enter judgment upon such finding. Authorities are cited which hold under language somewhat similar to that of the above finding, that the language did not amount to a judgment, but they were

## Swigerd v. Deck.

cases in which equitable relief was demanded by way of foreclosure of mortgage or otherwise, and that fact aided in construing the language used, and would in such cases justify a conclusion that the only effect was to make a finding of the amount which should be a lien upon the premises. In this case, however, nothing was sought in the pleadings except a personal judgment, and the court clearly finds the allegations of the cross petition to be true, and determines that the defendant should recover from the plaintiff, the amount of \$161.67. We hold in this kind of a case the language amounts to the rendition of a judgment.

It is further urged by counsel for plaintiff in error that the court of common pleas erred in rejecting evidence. Under the statutes of this state, it was the duty of Swigerd, when his case, which had been tried before a justice of the peace, was appealed, to file a petition setting forth his claim. Having omitted to do so and having allowed final judgment to be entered upon the claim set forth in the cross petition of Deck, it was too late to set up his claim in the action thereafter brought by Deck to enforce the collection of the judgment rendered in his favor, and we therefore find no error in the rulings of the court of common pleas in the rejection of evidence relating to such claim.

The premises sought to be subjected were claimed by Maude Swigerd, the wife of Samuel S. Swigerd, as a family homestead. The evidence showed that she and her husband had not lived upon the property for some three or four years, and that there had been, during a portion of that time, a contract in existence by which they agreed to sell the premises, and that the premises were worth the sum of \$1,650.

We think the court of common pleas was justified in finding that the homestead had not been abandoned for a temporary purpose, and that she was not entitled to hold the same as a homestead. The property being of the value stated, it would seem apparent that, in any event, Deck would be entitled to an order for the sale of the premises, and that the mortgage lien should be satisfied therefrom in order that it might be ascer-

## Lucas County Circuit.

tained whether a balance would be left applicable to the payment of this judgment.

Finding no prejudicial error, the judgment of the court of common pleas will be affirmed.

Wildman and Kinkade, JJ., concur.

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RAILWAYS.

[Hamilton (1st) Court of Appeals, June 30, 1914.]

Jones and Jones, JJ.

(Swing, J., not sitting.)

CINCINNATI, H. & D. RY. v. EDMUND BUXTON, ADMR.

1. Recovery for Death at Railway Crossing Where View of Tracks was Hidden Sustained.

Where at the intersection of a street and railway tracks at grade there is a high board fence enclosing a coal yard, which completely obstructs the view of tracks from the south until within a few feet of the tracks, and the testimony is conflicting as to whether the electric bell giving warning of approaching trains was ringing or was out of order, a verdict in favor of the administrator of a driver, whose wagon was struck by a train coming from the south at the rate of forty-five or fifty miles an hour, will not be disturbed by a reviewing court.

2. Verdict not Excessive.

A verdict of \$5,400 on account of the wrongful death of a man thirty-eight years of age, who left a wife and two small children, and who was in perfect health and earning \$20 a month and board as a driver on a milk route, is not excessive.

ERROR.

*Waite & Schindel*, for plaintiff in error.

*Schorr & Wesselmann* and *Thos. L. Michie*, for defendant in error.

JONES, O. B., J.

Plaintiff below recovered a judgment for damages for the death of his intestate, Leo Herppich, who was struck and killed by a train operated by the plaintiff in error in the village of Lockland, Hamilton county, Ohio, on December 22, 1909.



*Railway v. Buxton.*

The decedent was driving a covered milk wagon of the usual type, which was open in front and had open doorways on each side, the driver's seat being in the rear and between these two doorways. He was driving westwardly along Worthington avenue, which is a much traveled highway crossing the C., H. & D. Railway, practically at right angles, just south of its Lockland-Wyoming depot. The line between the adjoining villages of Lockland and Wyoming at that time was along the railroad, the tracks of same being located in the village of Lockland. On the south side of Worthington avenue just east of the railroad was a coal yard being operated by Henry Priessmann, which stood four or five feet above the level of Worthington avenue, and which was surrounded on its north and west sides by a tight board fence so high that a person driving westward on Worthington avenue could not see to the south along the railroad until he was very close to the tracks.

Counsel for plaintiff in error have undertaken, by means of photographs which were introduced in evidence and measurements taken by a civil engineer who testified in the case, to demonstrate the fact that the decedent might have been able to see an engine on the northbound track a distance of from 750 to more than 2,000 feet south of Worthington avenue. The difficulty with these photographs is that counsel failed to fix the location of the camera in the center of Worthington avenue where the decedent was driving, but has evidently fixed it at a point some distance north of the center, and the photographer admitted that the distances appearing in the foreground of the picture were deceptive; and the evidence of the photographs and the engineer was opposed to that of a number of plaintiff's witnesses who had been upon the ground and were familiar with the surroundings, and while not undertaking to give exact distances their testimony convinced the jury that decedent could not have seen, by the most careful looking, the approaching train in time to have avoided the injury.

There is no question, from the evidence, that the train was running at least forty-five to fifty miles per hour, and that the

## Hamilton County Appeals.

decedent was driving at a very low rate of speed. There is conflict in the testimony as to whether the whistle and bell were sounded as required by Sec. 8853 G. C. There was an electric signal bell at the crossing, and testimony was introduced to show that at periods shortly before and after the accident this bell was out of order, and there is conflicting testimony as to whether or not this bell was ringing at the time of the accident.

In this state of the record, we do not believe that the reviewing court should invade the province of the jury, and say that it was not justified in finding negligence on the part of the defendant and finding that plaintiff was not guilty of contributory negligence.

It is claimed that the court erred in admitting in evidence an ordinance of the village of Lockland which undertook to regulate the speed of trains within the limits of the village at not more than eight miles per hour. Such an ordinance is authorized by Sec. 3781 G. C. and we think it was properly admitted, limited as it was by the charge of the court.

Plaintiff in error urged as another ground of error the refusal of the court to send the jury back to their jury room to agree upon and return a more complete answer to the second interrogatory which had been submitted to them. This interrogatory was as follows:

"Did the deceased, Leo Herppich, as he was about to cross the tracks of the defendant, look to the south?" This was answered by the jury as follows: "We assume he did."

We think that in the absence of any direct proof to the contrary, the jury were justified in arriving at such an answer. Especially when, as we have stated above, we do not feel justified in disturbing their answer to the first interrogatory, which was as follows:

"Do you find from the evidence that the deceased, Leo Herppich, as he was about to cross the tracks of the defendant, could have looked to the south and seen the train by which he was struck in time to have avoided being struck? Answer No."

True, there is testimony by the engineer and at least one

**Railway v. Buxton.**

pedestrian on the street that they saw the wagon but did not see the driver look out of the wagon. Such testimony is, however, perfectly consistent with the decedent's performing his full duty to look before undertaking to cross, because one seated in such a wagon could no doubt look out through the openings at the sides, down the track, without changing his position, as effectually as he might by thrusting his head out of the wagon; and the engineer's testimony showed that he had paid so little attention to the details of the wagon that he thought its sides were covered solidly with no openings or doorways in them.

It is urged that the amount of the judgment, \$5,400, is excessive. Decedent was 38 years old, in perfect health, and left a wife and two young children aged six and four years respectively. At the time of his death he was living and working with his family, on his father-in-law's farm, driving a milk route, and received twenty dollars per month and board. We can not, therefore, say that the amount found by the jury is excessive.

Other errors in the admission of evidence and in the charge of the court are urged by counsel for plaintiff in error, but on careful consideration of same the court fail to find any prejudicial error, and the judgment is therefore affirmed.

**Jones, E. H., J., concurs.**

## Columbiana County Appeals.

**GAS AND OIL—INSPECTION.**

[Columbiana (7th) Court of Appeals, April 8, 1914.]

Pollock, Metcalfe and Norris, JJ.

**MARION COOPER V. TRI STATE GAS CO.****1. Gas Company has no Continuing Liability to Keep Service Pipes in Safe Condition Inside Curb Line.**

A gas company engaged in furnishing natural gas to the inhabitants of a municipality for consumption by means of lines of pipe laid in the streets and to the curbs thereof, where such pipes are connected with pipes conveying such gas over the premises and into the dwellinghouses of consumers thereof, such pipes from the curb into the dwellinghouses having been installed and being now maintained and controlled by such property owners and consumers, the same having been properly inspected before gas was turned in, is not thereafter required to inspect the same, nor is there a continuing liability on the part of such company to see that such piping is kept in safe and proper condition for the transportation of such gas.

**2. Notice of Defects in Service Pipes or Duty to Inspect Must be Alleged to Render Gas Company Liable from Leaks.**

In order to constitute a cause of action against a gas company by reason of failure to inspect gas pipes installed, owned, maintained and controlled by a consumer of gas leading from the curb into the dwellinghouse of such consumer, where damage to such consumer was caused by leaks in such pipes owing to natural decay or other faulty condition arising after a number of years of use thereof, there must be sufficient facts alleged to show notice to the company of such defective condition, or facts from which an inference of duty to inspect such pipes arises either from contract, custom or franchise.

[Syllabus by the court.]

**ERROR.***W. F. Lones*, for plaintiff in error.*Brookes & Thompson* and *W. C. O'Neill*, for derendant in error.**NORRIS, J.**

Plaintiff in error was plaintiff below and filed an amended petition in the lower court, to which the defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action.

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The court sustained the demurrer, and the plaintiff, not desiring to plead further, entered up a judgment dismissing the case. Error is assigned in this court to sustaining that demurrer.

The petition, in substance, states:

The defendant is a corporation engaged in the business of supplying natural gas to the citizens of the city of Wellsville and other cities for heating and lighting purposes, and has gas pipes laid in the streets of said city from which gas is supplied to the individual houses by service lines extending from such pipes in the street to the houses of the inhabitants; that the plaintiff was the owner of a lot or tract of land upon which her dwellinghouse was situated in the city of Wellsville, and that the defendant had been supplying her with natural gas for use in such dwellinghouse for a number of years; that the gas was conducted from the lines in the street over her land to her house, and her house was about eight feet from the line of the street, she paying for the gas a certain rate per thousand feet; that the defendant maintained and owned such of the pipe line as were constructed in the street up to the curb in front of plaintiff's property, and the plaintiff installed, maintained and owned the service pipe line leading from the curb to and upon the lot upon which her dwelling was located, and through said lot into her said dwellinghouse; that on or about January 17, 1912, owing either to natural decay or other faulty condition, said service pipe so installed by plaintiff, began to leak at a point on plaintiff's said lot, about one foot from her said dwellinghouse, and between the meter and her said dwellinghouse, and the gas escaping therefrom percolated through the ground into plaintiff's dwellinghouse, where it exploded and caused the damages complained of.

The plaintiff further says that as far as she knows the defendant had no actual knowledge of the faulty condition of said service pipe or that said gas was escaping from the same; but alleges that it was the duty of said defendant to have inspected said service pipe at the time the same was installed on her said premises; and to have inspected the same from time to time

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thereafter, and by the exercise of ordinary care in inspecting said service pipe, said defendant would have discovered the faulty condition of the same in time to replace said service pipe and prevent said explosion. And she says that the defendant negligently and carelessly failed and neglected to so inspect said service pipe on said plaintiff's said premises at any time, and negligently and carelessly continued to deliver its gas through the same to plaintiff's said premises; and by reason of the said negligence the gas was permitted to escape through said pipe and caused the damages aforesaid.

It will be observed that there are no facts alleged in this petition from which the duty of the defendant company to inspect these lines arises. Plaintiff alleges that the company did not inspect, but alleges no facts by way of contract or custom, or other facts from which it might be said that a duty arose to inspect the service lines in her dwellinghouse, or other dwelling-houses in the city of Wellsville. Then the question arises whether, from the situation and from the facts set out in this petition, it can be said that a duty arose on the part of the gas company to inspect the lines in the dwellinghouse, and on the private premises of the owners of these lines inside the curb.

We have been cited to a number of cases which we have examined, but there is no reported case in this state, so far as we have been able to find, or have been referred to upon this question.

The first case upon which counsel for plaintiff in error rely, is the case of *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316 [16 Sup. Ct. Rep. 564; 40 L. Ed. 712].

The first proposition of the syllabus in that case is as follows:

"It is the duty of a gas company to supervise and keep in repair a gas box which is part of the apparatus of the company, and is placed in a sidewalk to afford means for turning on or off the gas from a house, when it has entire control of the box to the exclusion of the property owner, although the latter is required to pay for the gas box and connection."

In this case it appears that a deep and dangerous hole was at this place where the gas box was, and that a resident of the

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District of Columbia fell into this hole through its not being properly guarded or covered, and recovered damages against the city of Washington. Then the city, under its arrangement, the franchise under which the gas company had a right in the city, brought suit to recover over the amount that had been allowed to the plaintiff in the first case.

Justice White, in stating the opinion says:

"It was proved on the trial of her case to have been an open gas box placed and maintained in the sidewalk by the gas company for its own use and benefit and which it was its duty to repair; that this duty had been grossly neglected by allowing the box to remain unrepaired, thus causing the injury for which the city had been held liable. The declaration, moreover, averred notice to the gas company, and the fact that adequate opportunity was given it to defend, and the failure of the gas company to act in defense of the suit," and so on.

It seems to us there is a vast difference between that case and the one we have set forth in this petition. The court says in the opinion:

"It would be unreasonable to infer that congress when it authorized the use of the streets or sidewalks for the purpose of the gas company's business, contemplated that the city of Washington or its successor, the District of Columbia, should keep in repair such apparatus, the continued location of which in the sidewalks of the city was permitted, not only as an incident to the right to make and sell gas, but also for the pecuniary benefit of the gas company."

The next case referred to is the case of *Memphis Consol. Gas & Elec. Co. v. Creighton*, 183 Fed. Rep. 552], and the point in that is stated in the first proposition of the syllabus in the circuit court of appeals of the sixth circuit:

"A gas company, which through its pipes supplies gas to a house and has control of the apparatus for cutting it off, when notified that gas is escaping in the house and informed of injury and danger to inmates therefrom, owes a duty to the occupants of the house to exercise reasonable diligence in shutting off the gas therefrom, and it is immaterial that the pipes

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where the leak occurred were owned by the owner of the house."

And that rule would apply here if the gas company had been notified by the owner of the house of this defective pipe, and that gas was escaping therefrom; but it does not seem to us to touch the question of the duty of the gas company, in the first instance, to inspect it from time to time for the purpose of ascertaining the condition of the pipes without any information from the property owner. Another case cited is that of *Schmeer v. Gaslight Co.* 147 N. Y. 529 [42 N. E. Rep. 202; 30 L. R. A. 653], by the court of appeals of New York. Without taking time to read the syllabus, I read from the opinion of Justice Peckham, on page 203:

"While this gas remained on the premises of the manufacturer, or while it was being conducted through its own pipes to different parts of the city, there can be no doubt that the company was bound to exercise vigilance to prevent injury to third parties from the dangerous qualities of the gas. The question is where its responsibility ended. The claim is made on its behalf here that such responsibility had certainly determined before this explosion occurred. It is urged that it had no responsibility for putting the piping into the house, as it was done by third parties under the employment of the owner; that it had no charge of such piping after it was fitted in the building; that the gas was turned on by third parties, without consultation with, or knowledge on the part of, the officers of the company, which simply was accustomed to, and in this case did, permit any one to turn on the gas after plans had been submitted to it, and a meter had been provided by it upon application."

In this case the other parties put the lines in the building, and without any inspection on the part of the gas company, it turned on its gas and it resulted in an explosion and injury. Then they further say on the question, after holding that under these circumstances it was a question for the jury and the gas company might be liable, speaking of the delivery of the gas:

"In making that delivery it is not an insurer, but is



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simply bound, in such a case as this, to that degree of care which the nature of the article it deals in, and the consequences to be apprehended from an accident, reasonably call for. Nor do we assume to say that when once the piping, in cases similar to this, has been fairly and properly examined previous to turning on the gas (if such examination by defendant's servants is called for at all), that thereafter there is a continuing liability on the part of the company to see to it that such piping is kept in proper condition. As the company has no control over the piping, does not put it in, and is not consulted about it, the principle upon which it might be held liable, in cases of this character, at the time of first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condition of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination at frequent intervals, of all the buildings in the city in which gas was used. This would be so onerous as to be practically impossible of execution, because of the expense to the company. The law ought not to and does not, exact an unreasonable amount of care from anyone. Under the restrictions, however, as above stated, we think the question of defendant's negligence was for the jury."

There are two other cases that still more firmly affirm the doctrine announced last in this case. I will read a portion of the opinion in the case of *State v. Gas Co.* 85 Md. 637 [37 Atl. Rep. 264] :

"All the cases agree that, to constitute a good cause of action, there should be stated and proved a right on the part of the plaintiff, and a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant,

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whereby the negligence and the injury there must be the relation of cause and effect."

In this case there are no facts alleged in this petition upon which a duty upon the part of the gas company apparently arises. But it is alleged as a conclusion of law that there was negligence in not inspecting these premises without any facts alleged upon which it might be said such duty was imposed upon the gas company.

But the case of *Smith v. Gas Co.* 24 R. I. 292 [52 Atl. Rep. 1078; 96 Am. St. Rep. 713], is still stronger:

"The failure of a gas company on introducing gas into a dwelling, to inspect pipes therein, which have long been out of use, but which were placed therein by the owner, and over which the company has no control, is not negligence, in the absence of any showing of a duty in such respect from contract, custom or charter."

And the court in the opinion say the same thing in stronger language:

"In the absence of any facts upon which to base an inference of duty, a court can not infer a general obligation to inspect pipes in a private house, which are not under the control of the company, and as to which it has no apparent relation other than the fact that its gas is to be used through pipes placed therein by the owner, as it has suited them to have them."

We have found no authorities, and none have been cited to us, in conflict with the principle announced in these cases, and none under the facts in this case as set out in this petition where a recovery was permitted against the gas company. It would seem a very onerous duty to impose upon gas companies, with their lines through the streets of a city, that from time to time, without notice, they should be called upon to inspect the service lines in the dwellinghouses and on premises of the parties who take gas from them, but we do think such duty is imposed on the property owner in reference to the use of this substance, owing to its somewhat dangerous quality, to exer-

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cise, constant vigilance in the use of it to see that their own appliances are in proper condition for the safe use of it. That is the holding in substance, in the case of *Bartlett v. Gas Co.* 117 Mass. 533, 539 [19 Am. Rep. 421].

We do not think that the amended petition states a cause of action against the gas company. It follows that the judgment of the court of common pleas will be affirmed.

**Metcalfe and Pollock, JJ., concur.**

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**SCHOOLS—OFFICE AND OFFICERS.**

[Holmes (5th) Court of Appeals, December 11, 1915.]

Shields, Powell and Honck, JJ.

**ALBERT E. CLINE V. OATH MARTIN ET AL.****1. Discretion of County Board of Education in Attaching Subdistricts to Village Districts not Interfered with.**

What is known as the rural school code confers a broad discretion on the county board of education in the matter of the establishment of new school districts, and when this is done by attaching four subdistricts to a village school district a court will not grant relief to a complaining taxpayer in the absence of a showing of fraud or an intentional abuse of discretion.

**2. Abuse of Discretion not Shown.**

There is nothing in the evidence submitted in the case under consideration which would indicate an abuse of discretion on the part of the county board, and the court would not be justified in limiting by construction the discretion so exercised.

**3. Members of County Board of Education not County Officers Requiring Election.**

Failure of the rural school act to provide for the election of the members of the county board of education by the people does not render the act invalid, for the reason that the jurisdiction of members of the county board is exclusive of territory embraced in any city school district and they are, therefore, not county officers.

**4. Rural School Code within Constitutional Restrictions Relating to Organization, Administration and Control of Schools.**

Full power is vested in the general assembly, under Art. VI, Sec. 3, of the amended constitution of September, 1912, to provide for the organization, administration and control of the public school system of the state, and the act in question is within the limits of this power.

[Syllabus by the court.]

## Holmes County Appeals.

*Carl Schuler*, Pros. Atty., *Weygandt & Ross* and *W. F. Garver*, for plaintiff.

*C. H. Workman*, *George W. Sharp* and *C. J. Fisher*, for defendants.

**HOUCK, J.**

This cause is here on appeal from the common pleas court of Holmes county. The petition in substance avers:

That the plaintiff is an elector and taxpayer in the school district in question, and that the defendants claim to be the members of the board of education of said district, which is known as the Nashville School District; that the county board of education of Holmes county, Ohio, on December 3, 1914, attempted to pass a resolution adding certain territory, amounting to four "subdistricts," to the Nashville Village School District; that the same was done under a pretended authority given under Sec. 4736 G. C. (104 O. L. 138); that four organized "subdistrict" schools with an attendance of more than twelve pupils each were thereby discontinued; that said children as a result were transported in wagons to said Nashville School, and which was a great inconvenience to said pupils so transported; that the defendants are about to issue and sell bonds in the sum of \$18,000 for the erection of a school building in the said Nashville Village School District; that said county board of education is without authority to change the lines of said district; that said Sec. 4736 G. C. and related sections thereto are in contravention of and repugnant to Art. 10 of Secs. 1 and 2 of the constitution of Ohio. Wherefore plaintiff prays for an injunction, and that said sections of the "New School Law of Ohio" be declared unconstitutional and null and void.

The defendants filed an answer, making certain admissions therein, but in substance being a general denial.

The plaintiff relies upon the following grounds for the relief prayed for in his petition:

First. That the resolution passed by the county board of education was not sufficient to give to it jurisdiction, if it had jurisdiction over the subject-matter.

Second. That said county board of education was without

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authority to do what it attempted to do, and had no jurisdiction to do so, and its acts therefore are null and void.

Third. That there was an abuse of discretion on the part of said county board of education, because the schools were not arranged so as to be most easily accessible to the pupils.

Fourth. That Sec. 4736 G. C., and kindred sections thereto (104 O. L. 138) are unconstitutional.

We are aware of the importance of the present case, and that several of the questions here presented are now, for the first time, before an appellate court in Ohio. What is denominated the "Rural School Code," being the act of February 5, 1914, and which is a radical departure in many respects, so far as school legislation is concerned, is now attacked. The sections of the act involved in this proceeding are found in 104 O. L. 136 and 138; and are as follows:

"Section 4728. Each county school district shall be under the supervision and control of a county board of education composed of five members who shall be elected by the presidents of the various village and rural boards of education in such county school district. Each district shall have one vote in the election of members of the county board of education except as is provided in Sec. 4728-1. At least one member of the county board of education shall be a resident of a village school district if such district is located in the county school district and at least three members of such board shall be residents of rural school districts, but not more than one member of the county board of education shall reside in any one village or rural school district within the county school district.

"Section 4728-1. All school districts other than village and city school districts within a civil township shall be jointly entitled to one vote in the election of members of the county board of education. The presidents of the board of education of all such districts in a civil township shall meet for the purpose of choosing one from their number to cast the vote for members of the county board of education. \* \* \*

"Section 4729. On the second Saturday in June, 1914, the presidents of the boards of education of the various village and

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rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. \* \* \* .”

“Section 4735. The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified.”

“Section 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. \* \* \* .”

Coming now to the first claim of plaintiff, Was the resolution fixing the lines of the district in question sufficient, and did it fully comply with the requirements of Sec. 4736 G. C.? We have examined the resolution, and we are of the opinion that it fully complies with the requirements and provisions of said statute, and that said county board of education had jurisdiction of the subject-matter, and that it was fully authorized to adopt the resolution, and that it contains, in substance and in fact, all the necessary things required by said statute.

As to the second claim of the plaintiff, that the county

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board of education was without authority to create the new district, let us examine the language of the statute as found in Sec. 4736 G. C.: *"To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another."*

In the present case four "subdistricts" as they originally existed were attached to the Nashville Village School District. Could any language be more plain and explicit than the above in giving the board authority to do just what it did in the premises? Certainly not. It provides for the changing of lines and the transfer of territory from one rural or village district to another—just what was done by the county board in this case, when it transferred the four "subdistricts" as they originally existed to the Nashville Village School District. Subdistricts not being provided for in the act of February 5, 1914, do not now exist, and it was only the territory that was bounded by the "subdistricts" as they formerly were that was annexed.

We do not think that the county board is limited in its right to arrange districts, by simply taking the territory from one rural district and adding to another. We feel that the statute is broad enough and gives to the county board authority to take territory from a rural district and attach it to a village district.

It is contended that Nashville is not a village district, and therefore the territory in the "subdistricts" could not legally be attached. We do not think it necessary for the proper solution of this question to determine whether it was or was not a village district, because under the provisions of Sec. 4736 it is immaterial, for the reason that it was territory that could be attached as provided and contemplated therein.

The third contention of plaintiff is that the county board of education did not arrange the schools as to topography and population so as to make them most easily accessible to the pupils in said territory, and thereby abused its discretion.

A county board is required to make a survey and prepare a map of the district, and to arrange the schools according to

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topography and population, and in such a manner as that they be most accessible to pupils in the district, in order that they may reach the schools with as little inconvenience as possible; yet the legislature certainly intended that a broad discretion be given the county board in this particular. The statute nowhere limits the authority of the county board in this matter, and there is nothing in the evidence submitted to the court that would indicate an abuse of authority on the part of the county board, and we do not think that a court would be justified in imposing a limitation by construction, or in any way interfering with the acts of such board in arranging the lines of the district and otherwise acting under said provisions of the statute, in the absence of proof clearly establishing fraud or gross and intentional abuse of discretion. And not finding in the present case, on the part of the county board, any equitable grounds of fraud or mistake, and not finding its acts wrongful, fraudulent, collusive or arbitrary, we do not feel that the board abused its discretion. We come now to the fourth and last claim made by the plaintiff, that said sections hereinbefore referred to of the "New School Law" are unconstitutional, being in conflict with Art. 10, Secs. 1 and 2; also Art. 2, Sec. 26 of the constitution of Ohio.

We may now inquire, when is a law in conflict with the constitution, and under what circumstances and state of facts should it be declared unconstitutional?

The legislature is a co-ordinate department of the government, and as such is invested with certain duties and responsibilities, and we think in the enactment of laws it is only fair to presume that it has considered and discussed the constitutionality of all measures passed by it, and therefore the unconstitutionality of the act must be clear or courts will sustain it. Courts may resort to an implication to sustain a statute, but not to destroy it; and courts cannot go beyond the province of legitimate construction in an attempt to save a statute. In other words, where the language used is clear, and the meaning plain, words cannot be read into it or out of it for that purpose. A statute cannot be declared invalid for the reason that it is



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unwise, unjust, unreasonable, or opposed to the spirit of the constitution; and unless it violates some express constitutional provision it must be held valid. While we change, while we alter, while we improve in our material and social life, yet these principles of construction now exist and will continue so until time shall be no more.

We think this doctrine is well established in this state, and we need only to cite the case of *Probasco v. Raine*, 50 Ohio St. 378, 390 [34 N. E. Rep. 536], where Judge Burket says:

"Whatever may be the rule elsewhere, it is clear that in this state the validity of an act passed by the legislature must be tested alone by the constitution, and that the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy.

"When the legislature is silent, the courts may declare the public policy, and mark out the lines of natural justice; but when the legislature has spoken, within its powers conferred by the constitution, its duly enacted statutes form the public policy, and prescribe the rights of the people, and such statutes must be enforced and not nullified, by the judicial and executive departments of the state.

"When the legislature, within the powers conferred by the constitution, has declared the public policy, and fixed the rights of the people by statute, the courts cannot declare a different policy, or fix different rights. In this regard the legislature is supreme, and the presumption is that it will do no wrong, and will pass no unjust laws. The remedy, if any is needed, is with the people and not with the courts."

Article 2, Sec. 26, of the constitution of Ohio provides:

"All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."

Article 10 provides:

"Sec. 1. The general assembly shall provide, by law, for the election of such county and township officers as may be necessary.

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"Sec. 2. County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county, in such manner, and for such term, not exceeding three years, as may be provided by law."

Counsel for plaintiff urge that members of a county board of education are county officers, and must be elected by the people, and therefore the sections of the act hereinbefore referred to contravene the above sections of the constitution of Ohio. We have now reached the place in the present case where we are called upon to pass upon, as well as to determine, who are county officers. We are pleased to cite, upon this branch of the case, the case of *State v. Hunt*, 84 Ohio St. 149, where Judge Spear says:

"We have not undertaken to enter the field of definition of the term 'office' or 'officer.' As given in the books they are multitudinous, not to say multifarious. Indeed, so varied are they, scattered through the books, that the ingenious barrister may find support for almost any proposition relating to the general subject which the necessities of his case may seem to demand. But, like maxims of the law, when used indiscriminately and without judgment, they are apt to mislead. One which seems to have met with most favor, perhaps, is that an office is a public position to which a portion of the sovereignty of the country attaches, and which is exercised for the benefit of the public. And yet, without a satisfactory definition of what is and what is not 'the sovereignty of the country' this definition seems to fail to adequately define. Manifestly, however, each case should be decided on its peculiar facts, and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created."

In view of the statement made by the learned judge in the above opinion, we will proceed in the light of the facts and the statute under consideration, and say—that a county officer is one whose right, authority, and duties are created and conferred by law, and whose jurisdiction is co-extensive with the county. If our definition is correct, then a member of

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a county board of education is not a county officer, from the fact that his jurisdiction does not extend over the entire county, for the reason that city school districts are not included in county school districts, but are especially exempted therefrom under favor of Sec. 4684 G. C., which provides: "Each county, exclusive of the territory embraced in any city school district \* \* \* , shall constitute a county school district \* \* \* ." The jurisdiction being a limited one—to a county school district—which does not include the county as a whole, it necessarily follows that such position is not within our definition of a county officer.

In addition to what we have already said concerning the constitutional question involved in the case at bar, we think that the entire matter is disposed of by Art. 6, Sec. 3 of our amended constitution of Ohio, as adopted September 3, 1912, which provides:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such districts."

If we give to the language used in the above amendment that plain meaning which the words and sentences certainly convey, we can reach but one conclusion, and that is that the legislature had power and authority to pass an act providing for a school system in our state, and that the said constitutional provision so authorizes. The language is clear, plain, and in no way ambiguous: "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds."

This certainly delegated to and gave full and complete authority and power to the legislature to pass the school act now under consideration, and to provide for its organization, administration and control. It will further be observed that said

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amendment especially provides for legislation with reference to city school districts, and that the legislature so provided in the school act by exempting city school districts from the supervision and control of county school districts, which is in accord with our theory that a member of a county school board is not a county officer, and that neither the framers of the constitution nor the legislature so intended.

The court is therefore unanimously of the opinion that said sections of the statute under consideration herein are not unconstitutional, and are not in conflict with or repugnant to the constitution of Ohio, or any article or section thereof.

We further find that none of the claims of plaintiff is well taken, and that he is not entitled to the relief prayed for in his petition, and the petition is dismissed at the costs of plaintiff.

Judgment accordingly.

Shields and Powell, JJ., concur.

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INSURANCE.

[Mahoning (7th) Court of Appeals, 1914.]

Pollock, Metcalfe and Norris, JJ.

H. E. MUSKOVITZ v. SUN UNDERWRITERS' AGENCY OF SUN INS.  
Co.

1. **Foreigner not Absolved by Ignorance from Conditions of Contract Signed.**

Ignorance of the contents of a contract signed, though a foreigner and not understanding the language, will not relieve a party from its effect.

2. **Entire Policy Void Clause not Rendered Severable Contract by Classification of Losses.**

A policy of insurance containing the clause "this entire policy shall be void" on certain named conditions is not a severable risk, although the amount of insurance is distributed among different classes of property.

3. **Unconditional and Sole Ownership Provisions Reasonable.**

An insurance policy provided that the entire policy should be void if the interest of the insured was otherwise than the unconditional and sole ownership of the property, or if it was encumbered by a chattel mortgage. These were reasonable provisions.

**Muskovitz v. Insurance Co.****4. Policy Voided by Failure to Disclose Liens.**

A conditional sale contract and a chattel mortgage were in force upon certain insured personal property, without the knowledge of the insurance company. Held: That the insured could not recover upon said policy in case of loss.

**ERROR.**

*Livingstone, George & Livingstone*, for plaintiff in error.  
*W. T. Porter*, for the defendant in error.

**POLLOCK, J.**

The plaintiff in error brought this suit in the court below on a policy of fire insurance which he claims the defendant issued to him in the sum of \$700 on certain personal property. He says that he performed all the conditions on his part to be performed, and that during the life of this policy the property insured was totally destroyed by fire, and he asks judgment for that amount. The policy shows that this insurance was issued on several articles of plaintiff's personal property, to wit: \$200 on an ice chest; \$200 on blocks, saws, knives and butcher's tools; \$200 on scales and counter, and \$100 on shelving.

To this petition there was an answer filed which admits that the defendant issued the policy and admits that the property insured was destroyed as alleged in the petition; and then answering says that the policy contained a provision that:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject-matter thereof, or if the interest of the insured in the property be not truly stated thereon."

And another provision that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the insured by other than unconditional and sole ownership, or, if personal property and be or become encumbered by a chattel mortgage."

The defendant further states that the plaintiff was not the sole owner of this property; that the scales had been purchased from the Toledo Computing Scale Company, and they held a

**Muskovits v. Insurance Co.**

conditional sale contract upon that part of this property, and that there was a chattel mortgage on the property at the time the policy was issued, probably on the ice chest, and that these facts were unknown to the defendant.

There was a reply filed and the case went to trial. The testimony shows that these allegations of the answer were true, that there was a contract of conditional sale on the scales, and that there was a chattel mortgage on the ice chest. It further shows that neither the agent nor the company had any knowledge at the time the insurance was issued, or at any time prior to the fire, of these encumbrances. The first knowledge they had was when a party holding one of these liens brought suit against the defendant setting up this insurance, and alleging their interest in the property and asking to be protected.

The plaintiff admits that these liens were on the property, but he seeks to avoid the enforcement of the conditions of the policy by showing that he was a foreigner, not understanding the English language, and that when he purchased these scales he says that the agent of the company presented some contract to him to sign; that he did not understand or know anything about it except that he would have to pay so much a month on the property, but that he signed that paper and about the same thing occurred as to the mortgage, and because he did not know these provisions were in the policy he seeks to avoid the conditions of the policy.

It is a well-known rule that ignorance of the contents of a contract signed, will not relieve a party from its effect. The mere fact that the plaintiff, because he was a foreigner, did not understand the conditions of the paper he signed for the scale company, and did not know that he had encumbered the property by a chattel mortgage, can not affect in any way the rights of the insurance company.

The policy of insurance provided that the entire policy should be void, if the interest of the plaintiff was otherwise than the unconditional and sole ownership of the property, or if it was encumbered by a chattel mortgage. This, we think, was a reasonable provision. The company might well refuse to

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insure property, where the party asking for the insurance was not the sole owner, or it was encumbered. No claim is made that the company, or its agents, at the time it issued this policy, had any knowledge of the conditional sale, or the chattel mortgage that was then on part of the property, and it had a right to stand on this condition of the policy and refuse to pay the loss.

But it is claimed that if it does prevent the recovery of the insurance on the items that were covered by the conditional sale and mortgage, that it will not prevent a recovery upon the other items of property insured. This is claimed on the authority of *Coleman v. Insurance Co.* 49 Ohio St. 310 [31 N. E. Rep. 279; 16 L. R. A. 174; 34 Am. St. Rep. 565], The trouble with that claim is that the case in *Coleman v. Insurance Co.* is distinguished by the case of *Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136 [68 N. E. Rep. 706; 100 Am. St. Rep. 663], where the Supreme Court says:

"An insurance policy which contains a stipulation that this entire policy shall be void on certain named conditions, is not a severable risk, although the amount of insurance is distributed among different classes or articles of property. *Coleman v. Insurance Co.* distinguished."

The conditions of the policy in the action at bar are identical with the conditions of the policy in *Germania Fire Ins. Co. v. Schild*, *supra*. In *Coleman v. Insurance Co.* *supra*, the policy provided that "this policy shall be void" while in the policy in the later case and the case at bar, the language is, "this entire policy shall be void." And for this reason the Supreme Court holds that it avoids every item insured in the policy.

For this reason the judgment of the court below is affirmed.  
**Metcalfe and Norris, JJ., concur.**

## Licking County Appeals.

## JUDGMENTS AND DECREES.

[Licking 5th Court of Appeals, October Term, 1915.]

Shields, Powell and Houck, JJ.

PERRY FEAZEL v. JACOB FEAZEL.

Conclusiveness of Former Judgment as to Matters Determined and that Might have been Litigated in Same Action.

Where testimony as to the claim now in suit was offered and went to the jury in a former trial, in which the present plaintiff was defendant and the present defendant was plaintiff, a reviewing court must assume there was a determination as to that claimed and the principle of *res adjudicata* applies, notwithstanding the answer in the former suit was a general denial and no affirmative relief was sought and no claim presented, with reference to the account on which recovery is sought in the case at bar.

[Syllabus by the court.]

*Kibler & Kibler*, for plaintiff in error.*Fitzgibbon, Montgomery & Black*, for defendant in error.

HOUCK, J.

This is a proceeding in error prosecuted from the common pleas court of Licking county, Ohio; the parties stand here in the same position as in the court below.

The cause was submitted to the common pleas court upon the question made by the pleadings in the case as to whether or not the plaintiff is estopped, and whether the claim in the petition is *res adjudicata* by reason of the allegations and matter set forth in the answer of the defendant. Said cause being submitted to the common pleas court upon the following stipulation and agreement between the parties hereto:

"That the question of *res adjudicata* and of estoppel shall be submitted to the court upon the pleadings in the case of *Jacob Feazel v. Perry Feazel*, heretofore tried in the court of common pleas of Delaware county, Ohio, being case No. 6821, the pleadings in this case and the bill of exceptions in said Delaware county case."

The common pleas court rendered a judgment in favor of the defendant, and a reversal of this judgment is sought by plaintiff in error.

The plaintiff brought suit in the common pleas court against the defendant asking for a judgment against him in



## Feazel v. Feazel.

the sum of \$1,061.25, alleged to be due him for board and lodging, etc., furnished by plaintiff to the defendant between August 17, 1910, and July 10, 1912, being the time defendant lived in the home of plaintiff in Delaware county, Ohio.

An answer was filed to the petition, pleading, among other things, the defense of estoppel and *res adjudicata* in this, to-wit: that all of the matters, things and questions involved in said suit had been fully tried, determined and adjudicated between the parties hereto in a suit which was tried in the common pleas court of Delaware county, Ohio, on October 17, 1915, and a final judgment rendered therein.

Two questions are presented in this case:

First. Is the cause of action set forth in the petition in this case in any way connected with the case tried in Delaware county wherein Jacob Feazel was plaintiff and Perry Feazel was defendant?

Second. Was the cause of action in plaintiff's petition in this case submitted to and passed upon by the jury in the Delaware county case, notwithstanding the charge of the court in said case?

The stipulation and agreement upon which this cause is submitted, among other things, provides that the bill of exceptions in the Delaware county case shall be considered by the court. We have examined the same with some care, with a view of ascertaining the facts that were presented in that case that would be applicable and proper in the determination of the questions involved in this case and especially with reference to the charge of the court.

The bill of exceptions discloses that practically all of the items set out in the petition in the case at bar were charges made within the time that the defendant lived in the home of the plaintiff and, speaking from the record, they were submitted to the jury in the trial of the case, and it is not within the province of a reviewing court to say they were not considered by the jury in arriving at its verdict. The record shows that the plaintiff had no contract of any kind with his father for care, support, board, etc., and therefore the charge of the court was proper and right when the court charged the jury: "There

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is no claim made in the answer for any compensation for board or anything else." This was a correct and proper instruction to give to the jury in the light of the testimony of the plaintiff himself.

We think it is a well settled principle of law in this state that when a matter has been finally determined in an action between the same parties by a competent and proper tribunal, the judgment is conclusive, not only as to what was determined, but also as to every other question which might properly have been litigated in the case.

True, the answer in the Delaware county case was a general denial and no affirmative relief was sought, and no claim presented therein with reference to the items set out in the petition in the case at bar, but evidence was offered in the trial of the case upon these items which went to the jury and, so far as a reviewing court is concerned, the jury took these items into consideration in arriving at its verdict.

Our Supreme Court has declared, as a well-settled principle of law, that when the facts which constitute the cause of action or defense have been, between the same parties, submitted to the consideration of the court and passed upon by the court, they can not again be the proper subjects for action or defense, unless the finding and judgment of the court is opened up and set aside by proper authority. This principle of law extends still further in quieting litigation. A party can not relitigate matters which he might have interposed but failed to do in a prior action between the same parties or their privies in reference to the same subject-matter, and if he fails to introduce matters for the consideration of the court that he might have done, he will be presumed to have waived his right to do so.

Relying upon the record in the Delaware county case and pleadings submitted, and applying thereto the well-known principles of law applicable to the questions presented in the case at bar, a majority of the court is of the opinion that the judgment of the common pleas court is right and should be affirmed.

Shields, J., concurs.

Powell, J., dissents.

Petri v. State.

**CRIMINAL LAW—EVIDENCE—JURY.**

[Hamilton (1st) Court of Appeals, November 8, 1915.]

Jones, Jones and Gorman, JJ.

JOHN PETRI V. STATE OF OHIO.

1. **Waiver of Jury Trial not Affirmatively Shown by Failure "to Demand Trial by Jury."**

Waiver of the right to a jury trial does not clearly and affirmatively appear where the record merely states that the "defendant did not demand a trial by jury."

2. **Evidence of Delinquency of Children Essential to Conviction for Causing and Contributing to Such Delinquency.**

A conviction under Sec. 1651 G. C. of causing, encouraging and contributing to the delinquency and neglect of children must be based on evidence of the delinquency of said children.

3. **Question as to Accused's Having Something to Say Presumed Pounded.**

Where the record does not distinctly disclose that the defendant was not asked if he had anything to say why sentence should not be passed, it will be presumed that such a question was asked in compliance with the statute.

**ERROR.**

*Cowell & Lamping*, for plaintiff in error.

*John Weinig*, for defendant in error.

**JONES, O. B., J.**

Plaintiff in error was convicted by the judge of the juvenile court without the intervention of a jury, under Sec. 1651 G. C., of causing, encouraging and contributing to the delinquency and neglect of two girls aged respectively eight and ten years. He seeks a reversal of the judgment in this court on three grounds: 1. That the court had no authority to try plaintiff in error without a jury. 2. That the finding of the court is not supported by any evidence of the delinquency of the minors. 3. That plaintiff in error was not asked, after being found guilty and before sentence, if he had anything to say why sentence should not be pronounced against him in accordance with the requirements of Sec. 13694 G. C.

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1. The record as presented fails to show distinctly that the defendant below waived his right to a trial by jury but merely that the "defendant did not demand a trial by jury." It is held in the case of *Simmons v. State*, 75 Ohio St. 346 [79 N. E. Rep. 555; 9 Ann. Cas. 260], that the waiver of a right to a jury trial must clearly and affirmatively appear on the record, and can not be assumed or implied by a reviewing court from his mere failure to demand a jury.

2. The record fails to show proof of the delinquency of the minor children or record their conviction as such delinquents. In the original Sec. 1651 G. C., in accordance with which the affidavit was drawn, the offense provided contemplated the existence of a delinquency in the child. The section as amended in 103 O. L. 871, provided another offense, to-wit: "acting in a way tending to cause delinquency in a child."

While the record might establish the latter offense, it is not sufficient to establish the offense charged in the affidavit without evidence of the delinquency of the children, and without such proof the charge must fail, no matter how culpable the acts of the defendant may be. *Fisher v. State*, 84 Ohio St. 360, 369 [95 N. E. Rep. 908].

3. The record does not distinctly disclose that defendant was not asked if he had anything to say why sentence should not be passed upon him before the sentence was actually pronounced. It must therefore be presumed that such a question was asked in compliance with Sec. 13694 G. C. *Bond v. State*, 23 Ohio St. 349; *Carper v. State*, 27 Ohio St. 572; *Bartlett v. State*, 28 Ohio St. 669.

For the reasons stated the judgment must be reversed.

Jones, E. H., and Gorman, JJ., concur.

Express Co. v. Starkey.

### CARRIERS—CONTRACTS.

[Richland (5th) Court of Appeals, January Term, 1915.]

Powell, Voorhees and Shields, JJ.

ADAMS EXPRESS CO. v. W. O. STARKEY.

**Exemption from Liability in a Bill of Lading Issued by Express Company Binding on Shipper, Precluding Recovery of Money Forwarded in Package as Merchandise and Lost in Transit.**

A shipper by express of a package containing money, which fact was not disclosed at the time of shipment, but to cover which he paid a higher rate upon being refused registration, is bound by a clause in the bill of lading which exempts the company from liability for the loss of money in transit not received and carried through its money department, notwithstanding his denial that he agreed to or had any knowledge of such a condition in the contract of shipment. Remittitur of judgment for plaintiff.

**ERROR.**

*McBride & Wolfe*, for plaintiff in error.

*Wm. McE. Weldon*, for defendant in error.

**SHIELDS, J.**

This case was originally commenced before a justice of the peace, and a default judgment was rendered against the defendant in favor of the plaintiff. The case was appealed to the court of common pleas, where a trial was had and judgment was rendered against the defendant.

It appeared by the petition of the plaintiff filed in the court below, that on December 20, 1910, a box containing certain goods consisting of books, dress goods, pocket knives, toys, including a twenty dollar gold piece and a five dollar gold piece placed in a nickel plated cup in said box, valued at \$50, was delivered by the plaintiff to the defendant at its office in the city of Mansfield, Ohio, for transportation and delivery to one W. D. Starkey at Zionsville, Indiana, for which the plaintiff paid to the duly authorized agent of said defendant company the sum of fifty-five cents. Said goods and money were not delivered by the defendant company to the said W. D. Starkey,

## Richland County Appeals.

but the said two pieces of gold coin and nickel plated cup and a certain book were found to have been taken out of said box upon its delivery to the said W. D. Starkey, to his damage in the sum of \$32.

By answer the defendant admits that on the date named in said petition certain goods consisting of books, dress goods, nickel plated cup, pocket knives and toys, were delivered to it by the plaintiff at its office in the city of Mansfield, Ohio, for transportation to the party named and at the place named, but it denied all the other allegations of said petition. And further answering it averred that said described goods were delivered to it under and by virtue of the terms of a written contract, which was assented to by the plaintiff, and which said contract, among other things, contained the following:

"Said property is accepted as merchandise only, and the express company shall not be liable in any event for the loss of money, specie, bonds, coupons, or other negotiable paper which the company does not receive or carry except through its money department, provided for that purpose."

That if any money was shipped by the plaintiff it was shipped in violation of the above stipulation in the contract without any knowledge on the part of the defendant that said package contained money, and that said money, if shipped, was not shipped through its money department provided for the purpose of shipping money.

Plaintiff by reply set up that when he delivered said package to the defendant's agent, he asked whether said package could be registered to insure safe delivery thereof on account of the special value of its contents, and was told by said agent that the defendant did not have a department in which packages could be registered, but by placing a proper value on the shipment, the company would be responsible to plaintiff for the safe delivery thereof to the consignee, whereupon he placed a value of \$50 on said package, and accepted a receipt therefor, quoted in the second defense of the defendant's answer; that the plaintiff was ignorant of any such provision or stipulation or custom and never assented thereto, nor did he assent to re-

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leasing the defendant from liability for loss of the money contained in said package. He further set up that the agent of the defendant, by his acts and declarations, and by his failure to call plaintiff's attention to the defendant's "money department" misled plaintiff into thinking and believing that the defendant would be responsible for the safe delivery of said package to the consignee up to the full value of \$50, regardless of the contents, and that plaintiff relying thereon delivered said package to the defendant for transportation as alleged in said petition.

With the issues thus made by the foregoing pleadings, the case was submitted to a jury resulting in a verdict for the plaintiff. On the overruling of a motion for a new trial judgment was entered on said verdict, and a petition in error with a bill of exceptions was filed in this court for a review of said judgment.

Numerous errors are assigned in said petition in error, but the view we take of this case will not require us to notice all of them.

In the bill of lading (denominated a contract in the defendant's answer) issued by the plaintiff in error to the defendant in error, upon the delivery of said box to it at its office in the city of Mansfield, it is averred in said answer that said box containing said property was received by the plaintiff in error to be transported and delivered to Zionsville, Indiana, subject to the said conditions contained in said bill of lading, that is:

"Said property is accepted as merchandise only, and the express company shall not be liable in any event for the loss of money, specie, bonds, coupons or other negotiable paper, which the company does not receive or carry except through its money department provided for that purpose."

In the reply it is admitted that such bill of lading or receipt was at said time issued by the plaintiff in error and accepted by the defendant in error. Do these recitals constitute a contract between the said parties? True, the bill of lading or receipt is signed by the plaintiff in error only, and not by

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the defendant in error, but it is held in the case of *Cincinnati, H. & D. Ry. v. Berdan*, 12 Circ. Dec. 481 (22 R. 326), that:

"A shipper is bound by the conditions of a bill of lading which he accepts at the time of shipping the goods, although he does not sign such bill of lading or agrees to it in writing, if signed by the railroad company and he accepts it."

So too in the case of *Jackson v. Ely*, 57 Ohio St. 459 [49 N. E. Rep. 792], Judge Bradbury in announcing the opinion of the court in that case, when commenting on the case of *Stone v. Vance*, 6 Ohio 246, says:

"There, only the party that received the property signed the instrument which was in the form of a receipt, but, nevertheless, it was held to embody the terms of a contract binding on all parties. The fact that the party not signing, takes into his possession, control and custody the instrument, establishes his assent to its terms."

But as stated, while admitting the delivery and acceptance of this bill of lading or receipt, the defendant in error claimed that he was ignorant of the contents thereof and was misled by the representations of the agent of the plaintiff in error into the belief that the plaintiff in error would be liable to the consignee of said box to the full value of \$50, without regard to its contents. The fact that the defendant in error made inquiry of the defendant's agent if the box could not be registered, or that he was led to believe from said agent's representations that he could recover the full \$50, regardless of its contents, if the plaintiff in error made default in making a safe delivery of the box, we regard as immaterial; but it is alleged that the defendant in error was not aware of the contents of the bill of lading or receipt when he accepted it, and that he did not know that it contained the stipulation set out in said answer and heretofore referred to. It is not claimed that said bill of lading or receipt was issued to him through any fraud or mistake, for neither are pleaded, nor does it appear that the defendant in error even read said bill of lading or receipt at the time it was delivered to him and he accepted it without objection. Will the law thus permit a party to a written con-



*Express Co. v. Starkey.*

tract afterwards to take advantage of his own neglect? We think not, nor do we think that a shipper delivering a package or parcel to a carrier with no accompanying representations that it contains articles of special value can recover for such articles of special value.

Judge Ranney in delivering the opinion in the case of *Wilson v. Hamilton*, 4 Ohio St. 723, says:

"It is but the dictate of common honesty that he who delivers property to a carrier, knowing it requires peculiar care and attention to its safe transportation, should make known to him the necessity in order that the proper precaution may be used."

Mere notification to the agent of the carrier that a package or parcel is one of importance is not sufficient to charge the carrier with knowledge of its value. The carrier is entitled to know if it be claimed that the contents are valuable. In *Humphreys v. Perry*, 148 U. S. 627 [13 Sup. Ct. Rep. 711; 37 L. Ed. 587], it is held:

"The principle which governs the compensation of carriers is that they are to be paid in proportion to the risk they assume. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him whereby his risk is increased or his care and diligence may be lessened."

Again in *American Express Co. v. Perkins*, 42 Ill. it is held that:

"In order to charge common carriers as insurers, they must be treated in good faith; and concealment, artifice or suppression of the truth will relieve them of this liability."

Without pursuing this subject further, we are of the opinion that the box in question was received and accepted by the plaintiff in error for transportation from Mansfield, Ohio, to Zionsville, Indiana, at the time stated, upon the conditions contained in said bill of lading or receipt, that the acceptance of the same by the defendant in error constituted a binding contract between the plaintiff in error and the defendant in error, and that the latter is now estopped from denying that he had agreed to said conditions.

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While we think that the defendant in error is concluded by the stipulation contained in said bill of lading or receipt from recovering for the value of the two gold pieces, we are likewise of the opinion that he is entitled to recover for the value of the book and silver cup lost in transit and described in the petition of the plaintiff below.

Further quoting from the case of *Cincinnati, H. & D. Ry. v. Berdan, supra*:

"Common carrier may limit his common law liability by a fair contract, but he can not limit or avoid his liability for his own negligence."

Here it is not denied that said book and silver cup fall within the classification of goods covered by the assumed risk, and the judgment of the court of common pleas will therefore be affirmed, upon condition that the defendant in error accept a remittitur of \$25 and interest thereon from the day of

1914, from said judgment, with the costs herein to be taxed against the plaintiff in error; or if the defendant in error shall refuse to accept said remittitur in five days from the rising of this court, the judgment of the court of common pleas will be reversed, and said case will be remanded to said court for further proceedings.

Powell and Voorhees, JJ., concur.

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EXECUTORS AND ADMINISTRATORS.

[Hamilton (1st) Court of Appeals, July 26, 1913.]

Swing, Jones and Jones, JJ.

\*ISAAC BATES, ADMR. v. JEROME D. CREED, ADMR. ET AL.  
(THREE CASES.)

JEROME D. CREED, ADMR. v. ISAAC BATES, ADMR. (THREE CASES.)

1. Commissions Required to be Apportioned Between the Original and Succeeding Representatives of Intestate's Estate.

The commissions fixed by Sec. 10837 G. C. for executors and administrators is in contemplation of law in full payment for all ordinary services rendered; hence, when it becomes necessary

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\*Affirmed, *Colored Industrial School v. Bates*, 90 O. S. 288.

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that an administrator de bonis non should be appointed to complete the settlement of an estate, the commissions should be equitably apportioned between the original and succeeding representatives of the estate in proportion to the value of the services rendered by them respectively.

**2. Election not Presumed From Securing Riders to Policies to Protect Interest of the Dower of Testatrix.**

Election by a widower to take under the will of his deceased wife is not implied from his securing attachment of riders to insurance policies on properties of the estate, especially since the riders were not in the nature of assignments of policies.

**3. Receiving Rents on Life Estate by Widower no Implication of Election to Take Under Will.**

Receiving rents on a building in which a widower is granted a life estate under the will of his deceased wife cannot be deemed, after his death, an election to take under a will by implication, there being no other person to make such collection. The fact that he signed rent receipts as executor and deposited the moneys in his individual account but used no part for his personal use does not change the conclusion stated.

**4. Acquiescing in Collection of Rents on Property by Agents of Devisee not Implication of Election of Widower Under Will.**

Acquiescing in the collection of rents by agents of a devisee under a will does not imply an election by a widower of testatrix to take under her will, especially since, regardless of the question of election, there was ample personal estate to meet all debts, and if he declined to accept the provisions of the will his only interest therein would be that of dower.

**5. Quitclaiming Interest in Property of Estate Precludes Implication of Election to Take Under Will.**

A widower's execution of a quitclaim deed of property devised to a humane society by his widow argues an election not to take under her will rather than an election to take.

**APPEAL and ERROR.**

*William Worthington, Willis M. Kemper and Robert S. Fulton*, for trustees for Colored Industrial School and for Jerome D. Creed, Admr.

*Healy, Ferris & McAvoy*, for Isaac Bates, Admr.

*W. C. Cochran*, for National American Woman's Suffrage Assn.

**JONES, O. B., J.**

These six cases were heard together, as they all related to matters concerning the settlement of the estate of Sallie J. McCall who died testate March 6, 1909. On March 25, 1909, her

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husband William A. McCall was appointed and qualified as her executor. In September, 1909, William A. McCall remarried, his second wife being Mary A. McCall, and upon September 9, 1909, he died intestate and childless. On September 16, 1909, Isaac Bates was appointed administrator of the estate of William A. McCall. On October 15, 1909, Jerome D. Creed was appointed administrator of the estate of Sallie J. McCall with her will annexed. On February 21, 1910, Isaac Bates as administrator of William A. McCall filed an account of the latter as executor of the will of Sallie J. McCall. On March 12, 1910, exceptions to this account were filed by Creed as administrator, and by Frank J. Jones and others, legatees under the will.

On March 29, 1910, before these exceptions had been disposed of, Isaac Bates as administrator of William A. McCall filed his petition in Hamilton common pleas court, No. 145181, against Creed as administrator with the will annexed and the beneficiaries under the will of Sallie J. McCall, alleging that William A. McCall during his lifetime had made no election of record to take under the will of Sallie J. McCall; that the debts of the estate had been paid by McCall during his lifetime and that it was ready for distribution which he, Bates, as administrator of the deceased executor, was willing and ready to make, and thereupon be asked the advice of the court as to how this distribution should be made.

On June 29, 1910, the probate court disposed of the exceptions to the account filed by Bates as administrator of William A. McCall, the deceased executor, and settled that account. Bates took exceptions to this settlement and gave notice of appeal. Afterwards he perfected this appeal and that cause came into the court of common pleas as No. 146011. At the same time he filed a petition in error which was docketed in the court of common pleas as No. 146010. On December 30, 1912, judgment was entered in the appeal cause modifying the order of the probate court; on a motion for a new trial this judgment was modified on March 3, 1913. To the judgment as thus modified a petition in error has been filed by Creed as adminis

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trator, which is cause No. 49 on the docket of the court of appeals.

Cause No. 145181, being that brought by Bates asking for instructions, resulted in a judgment rendered by the court on March 4, 1911, instructing him that his only duty in the premises was to turn over the assets of the estate of Sallie J. McCall to Jerome D. Creed, the administrator of that estate, and that he, Bates, as the administrator of the deceased executor, had nothing to do with the distribution of the estate of Sallie J. McCall. To this judgment Bates as administrator prosecuted both error and appeal; the appeal case being docketed as No. 5368, and the error case as No. 5388, in the circuit court. Mary A. McCall, the widow of William A. McCall, also prosecuted an appeal in this case and her appeal is docketed as No. 5369 in the circuit court.

On June 3, 1911, Jerome D. Creed, as administrator of the estate of Sallie J. McCall with her will annexed, filed his petition in the court of common pleas, docketed there as case No. 148025, alleging that Mary A. McCall, the widow of William A. McCall, claimed that he had not elected to take under the will of Sallie J. McCall prior to his decease and therefore that she as the sole distributee of William A. McCall was entitled to one-third of the estate of Sallie J. McCall, his first wife, which claim was disputed by the legatees under the will; and that other questions had arisen upon which he needed the advice of the court, and thereupon he prayed the court to instruct him as to his duties. The Colored Industrial School, the principal legatee under the will of Sallie J. McCall, filed a cross bill in this cause alleging that William A. McCall had as a matter of fact elected to take the provision made for him by the will of his first wife, Sallie J. McCall; and this claim was disputed by answer of both Isaac Bates as administrator of William A. McCall, and Mary A. McCall, his widow.

Judgment was rendered in it on December 16, 1912, declaring that William A. McCall had not elected to take under the will and giving instructions as to distribution. From this judgment Creed as administrator prosecuted an appeal, docket-

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ed as No. 5788 in the circuit court; and the Colored Industrial School also prosecuted an appeal, docketed as No. 5795 in that court.

The first question that presents itself is, the duty of Isaac Bates as administrator of William A. McCall, deceased, executor of Sallie J. McCall, with reference to her estate. Upon the death of an executor or an administrator it becomes the duty, by virtue of Sec. 10631 G. C., of the probate court to grant letters of administration with will annexed to some suitable person to administer the goods and estate of the deceased not administered, and by virtue of Sec. 10634 this administrator becomes at once entitled to the possession of the personal effects and assets of the estate unadministered, and it becomes his duty, under Sec. 10638, to file an inventory of such estate unless in the opinion of the probate court it should not be necessary, and he then proceeds to complete the administration of such estate in accordance with law.

In the estate of Sallie J. McCall, Jerome D. Creed has been appointed such administrator *de bonis non* with will annexed, and upon his qualification he thereupon became charged with the duty to take possession of the assets of that estate then unadministered and to proceed with the final administration of the estate.

Under Sec. 10822 G. C., it becomes the duty of Isaac Bates as the administrator of William A. McCall to render a final account of said McCall's administration as the executor of Sallie J. McCall, deceased, within six months after his appointment and it was his duty to turn over to Creed as administrator *de bonis non* all assets coming into his hands belonging to the estate of Sallie J. McCall subject only to the payment of proper commissions and fees to which decedent might be entitled as executor. In the opinion of this court the court of common pleas made an excessive allowance to said Bates as administrator of William A. McCall, deceased, on account of such executor's fees. In contemplation of law the commissions fixed by Sec. 10837 G. C., for executors and administrators, are to be received by them in full compensation for all their ordinary

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services. When by reason of the death of the original executor or because of his resignation or removal, it becomes necessary to have an administrator *de bonis non* succeed him, or for any reason successive administrators are appointed to complete the administration of one estate, it is not intended that the costs of administration should thereby be increased, but the statutory commissions should be equitably apportioned between or divided among the successive executors and administrators in proportion to the value of the services rendered by them respectively in such administration. The ordinary rule is that where there are two such successive officers that the funds allowable for compensation should be equally divided unless the work performed is unequal, and the rule is that one claiming more than such equal proportion must show the reason for such allowance. The work performed by William A. McCall in the settlement of his wife's estate was comparatively small but was all that any executor would naturally have done during the same period. He had secured the probate of the will, obtained letters testamentary thereunder, made publication and notice of his appointment, taken and filed an inventory of the estate, paid the funeral expenses and all claims against the estate except one doctor's bill, which is in the hands of the administrator *de bonis non*. He had himself filed no account, but Bates as his administrator has filed such an account for him and must make settlement with the probate court on his behalf. The duties of Mr. Creed as administrator *de bonis non* are correspondingly light considering the size of the commissions; he had already filed an inventory of the estate; will have to settle the income tax; pay the doctor's bill if it is a valid claim against the estate; file his final account; and make distribution of the estate.

Upon consideration of these respective duties the court is of the opinion that the statutory commissions should be divided equally between the estate of William A. McCall and his successor in the administration of the estate of Sallie J. McCall. And in figuring this statutory compensation commissions are to be taken upon all of the moneys and personal estate coming

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into the hands of said executor and said administrator *de bonis non*.

The only services rendered by the counsel of Isaac Bates as administrator of William A. McCall, deceased, with relation to the estate of Sallie J. McCall, for which compensation can be paid out of said estate, are those relating to the preparation and the filing of the final account in such estate on behalf of William A. McCall, the deceased executor. The allowance fixed by the court of common pleas is considered by this court excessive. This court is of opinion that an allowance of court excessive. This court is of opinion that an allowance of seven hundred and fifty dollars would be a sufficient and proper amount to pay for all the services rendered by said counsel to the estate of Sallie J. McCall, and that amount is allowed to be paid out of said estate. In fixing this amount the court is of opinion that the other valuable services rendered by distinguished counsel to Isaac Bates as administrator, have been with reference to the estate of William A. McCall, and should be paid from his estate and not from the estate of Sallie J. McCall.

The claim made by Isaac Bates as administrator, that he should retain all such part of the estate of Sallie J. McCall, deceased, as might be distributable to William A. McCall, can not be allowed. It might be in such an administration that all of the personal estate might be consumed in payment of debts and expenses of settlement. The amount of the estate for distribution can not be determined until final settlement of such estate, and for that reason it is provided by law, under the sections above referred to, that it is the duty of the administrator to take possession of the entire estate and make complete settlement before such distribution can be had.

The main question presented for determination is whether William A. McCall did elect by his conduct to take under the will of his first wife, Sallie J. McCall.

It is agreed that no citation was issued by the probate court as provided for in Sec. 10566 O. C. (R. S., 5963, as it stood at the time of the death of the testator), and he never



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made any formal election in accordance with the terms of Secs. 10570 G. C., *et seq.* The record shows that he had advised with Mr. Strunk, his attorney, in regard to the matter of election, and had it under serious consideration, but that he had expressed himself as unwilling to decide whether or not he would elect, just before taking the final journey which preceded his death. He had been advised that he had one year from the time of citation within which to decide as to his election, and that when he did elect his election would be made before the probate judge and record would be made thereof in the court. There is nothing in the record to show that he had been advised that any action he might take with reference to the property left by his wife might be construed to constitute an election under the will. It is urged, however, that certain acts did in fact constitute such an election by him. Those most relied on are:

1. That he received rentals from the Fourth street property in which under the will he was given a life estate.

2. That he secured the attachment by agents for different fire insurance companies of "riders" upon the insurance policies.

3. That he occupied the Avondale homestead after the death of Sallie J. McCall, up to the time of his marriage.

4. That he acquiesced in the collection of rents of the Andover Building by the agents for the Colored Industrial School.

5. That he executed a quitclaim deed to the Ohio Humane Society for the Clinton street house.

1. As to the collection of the Fourth street rents there was no other person interested in the matter who would collect the rents if he did not. He signed rent receipts as executor and while he deposited the moneys in his individual account and not in an account as executor, he had in that account at all times a very much greater sum than the total of these rentals and it is not shown that he ever used any part of them either for his personal use or for the purpose of the estate.

2. As to the riders on the insurance policy. In the insur-

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ance policy on the Andover Building at Plum and Longworth an endorsement or rider was attached to the policy as follows:

"CINCINNATI, May 17, 1909.

"It is hereby understood and agreed that the title of the within described property is now vested in the name of the Trustees of the Colored Industrial School."

This rider was signed by the agent and marked with the number of the policy. This was secured by Mr. Stark acting for the trustees. It is questionable whether it would be construed as an assignment of the policy. It is not the form which should have been used for that purpose. The endorsement on the policy covering the Eighth street property was as follows:

"CINCINNATI, O., May 24, 1909.

"It is understood and agreed that William McCall has a life interest in the within described property, and loss, if any, shall be payable to him, as his interest may appear."

This was marked with the policy number and signed by the agent. This was attached to the policy at the request of Mr. McCall who desired his interest protected. It is not in the form of an assignment of the policy, and was evidently prepared by the agent as a protective measure for the benefit of Mr. McCall, and was of doubtful value for that purpose. So far as it relates to the matter of election, it can have little probative force.

4. There is nothing in the fact that the agent of the Colored Industrial School was permitted to collect the rents of the Andover Building without objection by Mr. McCall. He had no right to interfere in such collection whether he elected to take under the will or not, as there was an ample personal estate to meet all debts, and if he declined to elect to take under the will his only interest in that property would be a dower interest which would not entitle him to the management of the property or the collection of its rentals, but could only be asserted by him by proceedings for assignment of dower under Sec. 12005 G. C.

5. As to the Clinton street property, his conduct in con-

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veying it by quitclaim deed to the Ohio Humane Society argues against rather than for an election to take. He certainly must have been deemed to have some estate, which doubtless was his dower interest which was carried by this deed. Of course if he had elected to take under the will he would hold no interest whatever in this Clinton street property, and the record shows that the attorney who was passing on the title as to whether he should give a quitclaim which would carry all his interest by way of dower or instead file a formal election in the probate court to take under the will. He declined to do the latter, but instead gave the deed.

The court is therefore of the opinion that no act of William A. McCall is shown in the record which would authorize it to find that he had in fact elected to take under the will. But under the terms of Sec. 10571 G. C., he must be deemed to have elected not to take under the will but to have that portion of his wife's estate given to him under the law. The court therefore finds that William A. McCall is entitled to receive out of the estate of Sallie J. McCall one-half of the first \$400, and one-third of the remainder of her personal estate.

Having found that William A. McCall has not elected to take under the will, his estate is not entitled to the rentals received from the Fourth street property, which amount to \$2500, and the court is of the opinion that under the doctrine of acceleration the trustees of the Colored Industrial School became entitled to the Fourth street property at once upon the refusal of William A. McCall to accept the provisions of the will and said trustees are therefore entitled to receive the rentals thereof from the date of the death of Mrs. Sallie J. McCall. *Macknet v. Macknet*, 24 N. J. Eq. 449; *Jull v. Jacobs*, L. R. 3 Ch. Div. 711; *Baptist Female University (Tr.) v. Borden*, 132 N. C. 476 [44 S. E. Rep. 47]; *Marvin v. Ledwith*, 111 Ill. 144. This rule is recognized in *Millikin v. Welliver*, 37 Ohio St. 460; *Holdren v. Holdren*, 78 Ohio St. 276 [85 N. E. Rep. 537; 18 L. R. A. (N. S.) 272].

Having found that William A. McCall failed to elect to take under the will of Sallie J. McCall, the Avondale home and

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the household goods therein which had been given to him under the terms of the will, must be sold by the administrator *de bonis non* and the proceeds applied for the benefit of the disappointed legatees whose share might be reduced by reason of such nonelection.

The question remains as to what legatees are affected by reason of such nonelection. The court is of the opinion that the intention of the testator under item 13 was that all of the specific bequests named in her will should be discharged and paid before the bonds owned by her and the remainder of the stocks owned by her at her death should go to the trustees for the Colored Industrial School, item 13 taking the form in that respect of a residuary legacy. The bequests therefore made to testator's cousins, to the National American Woman's Suffrage Association, and to the other beneficiaries other than said trustees for the Colored Industrial school should therefore be paid in full out of the proceeds of stocks belonging to said estate, provided such stocks are sufficient, as apparently they will be, to make up the full amount of said legacies after the estate of William A. McCall has been paid the amount that it will receive under the terms of this decision.

*Bates v. Creed*, Nos. 5368 and 5369, are appeal cases, and judgment will be entered therein to the effect that the administration of the estate of Sallie J. McCall must be completed by her administrator *de bonis non* and not by the administrator of her executor.

*Bates v. Creed*, No. 5388, is an error case relating to the same matter, and should be dismissed.

*Creed v. Bates*, Nos. 5788 and 5795, are appeal cases in which the decree should provide that William A. McCall did not elect to take under the provisions of the will of Sallie J. McCall, and her estate should be distributed as above decided.

*Creed v. Bates*, No. 49 Hamilton court of appeals, involves the settlement in the probate court, and the allowance of executor's commissions and counsel's fees should be ordered therein as above found.

Swing and Jones, E. H., JJ., concur.

Bertram v. Munford Co.

### ERROR—PLEADING.

[Hamilton (1st) Court of Appeals, November 15, 1915.]

Jones, Jones and Gorman, JJ.

P. C. BERTRAM v. THEOBALD MUNFORD CO.

**Court Striking from Files Answer Filed by Leave Because Motion Pending for Default Abuses Discretion.**

A court abuses its discretion in striking from the files an answer which was filed by leave, where no ground for so doing was shown except that at the time the answer was tendered and leave to file granted, a motion was pending for a default judgment and the answer set up only a general denial.

#### ERROR.

*Beece & Reece*, for plaintiff in error.

*Cogan, Williams & Ragland*, for defendant in error.

#### GORMAN, J.

The record in this case discloses that an action was commenced by defendant in error before a justice of the peace to recover for goods sold and delivered, that judgment was rendered in favor of defendant in error and an appeal from said judgment was taken by plaintiff in error and a transcript filed in the common pleas court on December 26, 1913. On February 4, 1914, the defendant in error being in default filed a petition on appeal. On June 27, 1914, the plaintiff in error being in default asked and obtained leave to file an answer which was a general denial. Two days later, on June 29, 1914, defendant in error filed a motion to strike the answer from the files and for judgment. No grounds are set out in the motion for this action. On July 2, three days after the filing of said motion, the court granted the same, and the entry recited that it appeared to the court that at the time defendant tendered his answer and asked leave to file the same, a motion was pending on behalf of plaintiff for a default judgment, and it appearing to the court that said answer is a general denial, the court finds said motion to be well taken.

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The entry granting leave to file the answer was set aside, and the answer stricken from the files.

On the same day, by a separate journal entry, the court entered judgment by default against plaintiff in error, defendant below. Exceptions were taken by plaintiff in error to these proceedings, and the cause is here on error to said judgments.

We think the court of common pleas erred in striking the answer of plaintiff in error from the files. No cause is shown for such a proceeding. The defendant below had secured leave of court to file his answer, a general denial, and no claim was made that there had been any impropriety or misconduct in securing leave to file the pleading. The record fails to show that there was a motion pending for a default judgment; but if there had been such a motion pending it was within the sound discretion of the *nisi prius* court to grant leave to defendant below to file an answer. There was no claim made that the answer was false or frivolous or filed as a sham pleading for the purpose of hindering or delaying plaintiff in the collection of his claim. Even if the court of common pleas in the exercise of a sound discretion could have stricken the answer from the files, the facts in this case show that there was an abuse of its discretion.

Judgment reversed and cause remanded for such proceedings as are authorized by law.

Jones, O. B., and Jones, E. H., JJ., concur.

Watson v. Insurance Society.

## INSURANCE.

[Brown (4th) Court of Appeals, December 12, 1913.]

Sayre, Jones and Walters, JJ.

A. R. WATSON ET AL. V. NORWICH UNION FIRE INS. SOC.

**1. Insurance Policy on Manufacturing Plant Voided by Factory Remaining Idle.**

Where a policy of fire insurance covering a manufacturing establishment contains the provision that the entire policy shall be void if the establishment cease to be operated for more than thirty consecutive days unless consent thereto shall be endorsed on the policy, and a fire occurred after the establishment had been idle for more than thirty consecutive days, the insured is not relieved from this contractual provision by a rider attached to the policy, reading: "privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."

**2. Rider to Fire Policy Permitting Closing of Factory not Exceeding Thirty Days no Waiver of Policy Conditions unless Endorsed.**

Nor does it avail the insured that the agent who wrote the policy knew that the establishment was idle at the time the policy was written and remained idle until the occurrence of the fire, where there was a further provision in the policy that no agent should have power to waive any condition of the policy except as such waiver is endorsed thereon.

ERROR.

*O. E. Young and J. W. Bagby*, for plaintiffs in error.

*J. W. Mooney and J. R. Moore*, for defendant in error.

**WALTERS, J.**

This was an action brought by the plaintiffs in error in the court below to recover of the defendant upon an insurance policy alleged to have been issued to them, insuring certain property therein described, which property had theretofore been destroyed by fire.

The insurance company, in its third defense, alleged that there was a provision therein that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the subject of insurance be a manufacturing establishment and it be operated, in whole or in part, at night later than 10 o'clock or

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if it cease to be operated for more than thirty consecutive days."

It is also alleged in said third defense that said policy also contained the following:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. \* \* \*

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

It is further alleged that the subject of insurance was a manufacturing establishment, and the same was not being operated at the date of the fire and had ceased to be operated for more than thirty consecutive days prior thereto, and that no agreement was endorsed upon said policy or added thereto consenting that said manufacturing establishment should cease to be operated for more than thirty days, or providing that said policy or added thereto consenting that said manufacturing establishment in said policy of insurance, be void.

The reply of the plaintiffs to the third defense alleges that they deny the policy contained the provisions as therein set forth, and they deny that no agreement was endorsed upon said policy or added thereto consenting that said manufacturing establishment should cease to be operated for more than thirty days or providing that said policy should not become void.

The case proceeded to trial, and at the close of plaintiffs'



*'Watson v. Insurance Society.*

testimony the defendant moved the court to direct the jury to return a verdict for the defendant, which the court did. Thereupon, a petition in error was filed in the court of appeals, to which was attached a bill of exceptions containing all of the evidence and proceedings in the court below, asking a reversal of the case chiefly because the court erred in directing a verdict on the issues presented by the third defense and the reply thereto.

The evidence, pleadings and record show that the insured property was a manufacturing establishment; that at the date of insurance it was not running, nor was it at the date of the fire, nor had it been in operation at any time from the issuance of the policy up until the fire.

The question presented is: Does the language set up in the third defense constitute a bar to the right of the insured to recover at the time plaintiffs rested their case?

There was a slip or rider attached to the policy which is as follows:

"Privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."

Counsel for plaintiffs in error contend that no proof was in evidence that a notice had not been given.

The policy itself was in evidence and it provided that—

" \* \* \* nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

No written permission to cease operations during the time of the fire was written on or attached to said policy.

It is further stated in the policy that:

" \* \* \* no agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto."

The policy, itself, provided how permission should be given to cease operations and required that it should be endorsed on the policy or added thereto; and the policy not disclosing any such privilege entered thereon or added thereto, it follows that

## Brown County Appeals.

as no notice was legally given to the company, as disclosed by plaintiffs' evidence, the policy became void and the defendant was not required to do any affirmative act declaring a forfeiture. *Betcher v. Insurance Co.* 78 Minn. 240 [80 N. W. Rep. 971]; *Johnson v. Insurance Co.* 41 Minn. 396 [43 N. W. Rep. 59]; *Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. Rep. 703 (Tex. Civ. App.); *El Paso Reduction Co. v. Insurance Co.* 121 Fed. Rep. 937; *Day v. Insurance Co.* 70 Iowa 710 [29 N. W. Rep. 443].

The fact that the establishment was not in operation to the knowledge of the agent at the time the policy was issued can not deny to the company the right to provide by contract that it should become void if it ceased to operate for thirty consecutive days thereafter unless privilege attached to the policy or endorsed thereon should be granted.

It is contended by plaintiffs in error that the rider or slip attached, being a part of the contract, so modified the clause in the printed or body part of the same as that it overcome the clause of forfeiture and it did not become void, by its terms, as it did in the body of the contract.

This contention we can not subscribe to. The language of the slip is:

"Privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."

The words, "without notice to the company," must be held to apply to the privilege of cessation of operations within the thirty days and not that the nonoperation in excess of thirty days should be without notice to the company.

The words "cessation of operation" means a "period of idleness—wanting in operation," and these words, and also the following, "cease to be operated," which is prohibited by the provisions of the policy, is a condition of idleness or nonoperation of a manufacturing establishment beyond the period permitted. *El Paso Reduction Co. v. Insurance Co. supra.*

The court in this case holds:

"Upon April 20 the first permit was issued: 'Privilege is hereby granted to cease operations for one month from date.'

*Watson v. Insurance Society.*

The effect of that was simply to extend the time of permitted idleness from ten days to one calendar month. In other words, instead of being allowed to have the plant idle for ten days plaintiff was allowed to have it idle for thirty days."

Nothing is said in the privilege rider about the effect which nonoperation beyond thirty days should have upon the policy; that is contained in the policy contract proper, which provides it shall be void if the plant ceases to be operated for more than thirty consecutive days.

The printed provision in the body of the policy must be construed together with the same subject in the rider; to do otherwise would render meaningless a part of this contract. Whenever there are two constructions to be placed upon a written contract, one of which will give force to all of its provisions that one must be observed and followed.

Counsel for defendant in error has cited the case of *Happ v. Insurance Co.* 85 Ohio St. 473, which was an affirmance of the circuit court, without opinion. In that case, however, the conditions of the policy violated were:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if illuminating gas or vapor be generated in the described building, or adjacent thereto, for use therein."

And also:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if there be kept, used or allowed on the above described premises \* \* \* gasoline."

The insurance company in that case contended that there could be no recovery because illuminating gas was being generated and used therein. The plaintiffs in error contended that because illuminating gas was being generated when the policy was written and the soliciting agent knew that fact, and because, in addition, the policy in that case expressly covered "gas and heating apparatus," the above quoted conditions were not violated. But the Supreme Court, in affirming the circuit court, repudiated that contention.

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The case of *Gump v. Insurance Co.* 34 O. C. C. 36 (15 N. S. 428), seems, by the second syllabus therein set out, to hold a contrary view to this opinion. This case was decided by the circuit court of the fifth circuit, and appears to have been affirmed by the Supreme Court in *National Union Fire Ins. Co. v. Gump*, 86 Ohio St. 325, without opinion. The facts, as disclosed by the opinion of the circuit court, do not clearly show what the conditions and circumstances were; and, therefore, we may surmise that the facts and circumstances in that case, when fully disclosed, would not warrant the second syllabus therein reported. It would seem at least, from the case in *Happ v. Insurance Co.*, *supra*, which was also an affirmance of the circuit court without opinion, that that case would be in direct conflict with the affirmance in the Gump case.

At least, we are persuaded by the current of authority that the rule laid down here is the one that has been followed and should govern this action.

What we have said in respect to this proposition dispenses with a further examination or discussion of the other questions made in the case; and,

The judgment of the common pleas court will be affirmed.

Sayre and Jones, JJ., concur.

McCune v. Larkin.

### EVIDENCE—PEDIGREE.

[Hamilton (1st) Court of Appeals, February 7, 1916.]

Jones, Jones and Gorman, JJ.

CHARLES MCCUNE ET AL. V. HANNAH HARTNETT LARKIN.

1. Finding as to Pedigree not Disturbed if Elimination of all Branches Originating in Given Country Required.

A reviewing court will not disturb a finding of fact as to pedigree, where to have made a different finding would have required the elimination of all the members of all the branches of a family originating in a foreign land.

2. Finding as to Pedigree not Reversed for Hearsay Evidence Admitted or Jury Trial Refused in Partition Suit.

Nor will the finding with reference to pedigree be disturbed because of the introduction of hearsay evidence, or refusal of a demand for trial by jury where the action was in the form of a suit in partition.

#### ERROR.

*Marston Allen, Jas. S. Robinson and Otto Pfleger*, for plaintiffs in error.

*B. S. Murphy and Galvin & Galvin*, for defendant in error.

JONES, O. B., J.

The real question to be determined in this case is to whom the real estate of William H. Seymour passed by descent. He died without issue, after the death of his wife. The brother of his wife by the full blood claimed to be the sole owner. The three half-sisters and the son of a deceased half-sister claimed to each be entitled to a share with this brother in this inheritance. All of said relatives of the deceased wife claim under the provisions of Sec. 8576 G. C., which casts the descent upon the heirs of the wife only on the entire failure of heirs of her husband under the three preceeding sections of the General Code.

The court below found that the defendant in error was the grandchild of a sister of the mother of William H. Seymour, and was his only living heir at law, and next of kin. The record

## Hamilton County Appeals.

developes an interesting inquiry into the family history of William H. Seymour, and shows the descendants of his maternal grandparents, Jerry and Kate Murphy of Kilbruin Parish, County of Cork, Ireland. Plaintiff is clearly shown to be the sole survivor of this branch of the Murphy family. As the entire Murphy family of County Cork must be eliminated before any of the parties to the suit, other than defendant in error, could establish an interest in this property, the improbability of their success is manifest. In our opinion the findings of fact as made by the court are fully sustained by the evidence.

Numerous objections were made as to the admission of evidence. The rule as to the admission of hearsay evidence to established pedigree is stated in 2 Jones, Evidence Sec. 312, in which is found the following language:

“The law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest in the declarations of the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question. From necessity, in cases of pedigree hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. It is not every statement or tradition in the family that can be admitted in evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken.”

## McCune v. Larkin.

It is also well stated in the opinion of the court in *Fulker-son v. Holmes*, 117 U. S. 389, 397, as follows:

"The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that strict inforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. \* \* \* Traditional evidence is, therefore, admissible. The rule is that declarations of deceased persons who were *de jure*, related by blood or marriage to the family in question may be given in evidence in matters of pedigree. A qualification of the rule is that before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy."

We fail to find any error prejudicial to plaintiffs in error regarding the admission of evidence.

It is also urged that the court erred in refusing the demand of plaintiff below for a jury trial.

It was practically conceded by the parties that the party having title to the land must be considered as in possession of it, a receiver having been appointed by the court to care for the property until the determination of the title. The action was brought as an action for partition. Partition is a civil action not triable by a jury. *McRoberts v. Lockwood*, 49 Ohio St. 374 [34 N. E. Rep. 734]; *Swihart v. Swihart*, 4 Circ. Dec. 624 (7 R. 328.) The fact that the title of plaintiff was denied by the answer did not oust the court of jurisdiction. *Perry v. Richardson*, 27 Ohio St. 110. The answer and crosspetition of Hannah Hartnett Larkin was in the nature of an action to quiet title, which is a civil action under the code, in which the parties are not entitled to a jury. Under the pleadings, there-

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fore, it was not error in the trial court to refuse the demand for a jury. Nor do we find any other errors to the prejudice of plaintiff in error.

Judgment affirmed.

Jones, E. H., and Gorman, JJ., concur.

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SALES.

[Hamilton (1st) Court of Appeals, January 31, 1916.]

Jones, Jones and Gorman, JJ.

CHARLOTTE T. BROWN, IN RE, ET AL.

**Assignee Obtains no Title to Goods Sent without Selection by or Price Given to Possible Buyer though not Rejected for Eight Days after Bill Sent.**

A sale of goods is not complete within the provisions of Sec. 8399 G. C. when they are placed in the house of a possible buyer without being selected by or any price being given to the buyer, even though they are retained without notice of rejection for eight days after a bill is sent, accordingly the title remains in the seller and the assignee of the buyer has no claim thereon.

*Samuel Wolfstein* and *Dempsey & Nieberding*, for W. H. Davis.

*Worthington, Strong & Stettinius*, for Loring Andrews.

*Thomas Bentham*, for trustee.

## PER CURIAM.

After a consideration of the facts in this case and applying thereto the law of Ohio with regard to sales we reach the conclusion that on May 9, 1913, the title to the personal property in question was in the Loring Andrews Company and did not pass to the assignee.

Section 8399. G C.. provides:

"Rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer" and by the language of the section said rules do not apply where a different intention appears.



**Brown, In re.**

The goods were sent to Mrs. Brown's house on approval, and hence the second subdivision of rule 3 of Sec. 8399 would apply here. It provides:

"(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

"(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

"(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. 'What is a reasonable time is a question of fact.'"

Mrs. Brown had not signified her approval or acceptance of the goods, but she had retained them without notice of rejection. As no time was fixed for the return of the goods, the sale would be complete on expiration of a reasonable time, and what is a reasonable time is the question of fact in this case.

The time may vary owing to the circumstances of each case. Here no price was given Mrs. Brown on the goods. Most of the articles had not been selected by her, but were placed in her home during her absence. She had no intimation of the price or that the goods were charged to her as sold until eight days before the assignment. At that time and for months before, she was ill, insolvent and much worried over business affairs of a different nature, of greater magnitude and "nearer consequence." The fact that she let eight days elapse after receipt of this bill when she was obviously contemplating bankruptcy is not conclusive evidence that she accepted the goods. She could have returned the bill received by her with notice of rejection and would not have been indebted to the firm for same.

Such being the case the assignee or trustee has no claim upon the goods and the Loring Andrews Company are entitled to the proceeds of the sale of the property, to-wit, \$1,200.

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## NUISANCE—WATERS AND WATERCOURSES.

[Perry (5th) Court of Appeals, November 19, 1915.]

Shields, Powell and Houck, JJ.

## STANDARD HOCKING COAL CO. v. MARY A. KOONTZ

**Actual Damages Only Recoverable in Action for Pollution of Running Stream by Pumpings From Coal Mines.**

Where water pumped from a coal mine and discharged into a running stream is so impregnated with sulphuric acid as to pollute the stream and a neighboring well to such an extent that live stock will no longer drink therefrom and the water from the well is rendered unfit for domestic purposes, the damage sustained by the riparian owner is measured by the permanent injury to his land as shown by its diminished rental value or the cost of installing another sufficient water supply.

*T. M. Potter and George A. Fairbanks*, for plaintiff in error.

*C. A. Donahue and T. B. Williams*, for defendant in error.

**HOUCK, J.**

This is a proceeding in error prosecuted from the common pleas court of this county, asking that the court below be reversed in a judgment rendered in favor of the defendant in error, the plaintiff below, against the plaintiff in error, who was the defendant below. The suit was for alleged damages to the farm of the plaintiff below.

The petition in substance avers that the plaintiff is the owner of a farm of 158 acres, located in Perry county, Ohio; that running through said premises is a natural stream of water and that prior to the grievances complained of, as hereinafter set forth, this stream had been used by her for the purpose of watering stock and that it was the only available stream for that purpose; that on said premises were dwelling houses and a barn; that there was a valuable well of water which was used for domestic purposes; that the defendant owned and operated a coal mine north of said plaintiff's premises and nearby said stream of water; that defendant made an opening into said mine through which water was pumped therefrom and found its

## Coal Co. v. Koontz.

way into said stream above referred to, and that said water so pumped into said stream was highly impregnated with sulphuric acid, and that it polluted the water in said stream flowing through the land of plaintiff and it found its way into said well on the premises of plaintiff and rendered the water therein useless for domestic or any other purposes, and by reason thereof said farm had become less valuable and her rents and income therefrom had decreased; that she expended large sums of money in an effort to secure suitable water and by reason of the same has been damaged in the sum of \$2,000, and for which sum she prays judgment.

The defendant filed an answer to the petition which was in the nature of a general denial. Upon the issue joined the cause was submitted to a jury and a verdict rendered for the sum of \$280 in favor of the plaintiff. A motion for a new trial was filed, heard and overruled, and a judgment rendered on the verdict. The plaintiff in error seeks a reversal of this judgment and in its petition in error sets forth a number of grounds of alleged error, but its counsel in oral argument urge but two of them, namely: first, that the court erred in not giving to the jury requests Nos. 2 and 3, which were in writing, and were requested to be given by defendant below before argument; second, that the court erred in its general charge to the jury.

Taking up the first ground of alleged error, to-wit, that the court erred in its refusal to give requests Nos. 2 and 3 before argument, will say that we have examined these requests and while we are of the opinion that as abstract propositions of law they are sound and should be given in such a case, where the facts involved in the case warrant the application of such principles of law as are contained in said requests Nos. 2 and 3 but on an examination of the record and the evidence disclosed therein, we are of the opinion that the facts in the case at bar do not warrant the application of the principles of law as set forth in said special requests Nos. 2 and 3, and that the court below did not err in refusing to give the special requests hereinbefore referred to.

Coming now to the second ground of alleged error, that the court erred in its general charge to the jury, will say that coun-

## Perry County Appeals.

sel for plaintiff in error complains and contends the court's charge to the jury with reference to the measure of damages was not the law applicable to the case at bar. That part of the charge to which special objection is made is as follows:

"Now the claim here is that the stream was polluted; that the stream in a state of nature was uncontaminated, but by the discharge of sulphur water from this particular mine of defendant the stream was contaminated, and as it passed the place where it passed over her land it was rendered useless for the purpose of watering the herds of cattle she may have had and the well was totally destroyed for domestic purposes.

"That allegation the defendant denies and the burden of proof then is on the plaintiff. If you find that the well was polluted, that the well was in fact destroyed, and if you go further and find that it was done and contributed to either in whole or in part on the part of the defendant, you will go further and inquire what, if any, damage has been sustained upon the part of the plaintiff.

"Now, the plaintiff can only recover, if she recover at all, her actual damages, and she can only recover upon the claims specifically set forth and complained of in this petition. Now, she claims that the rental values of her premises were diminished and that the value of her farm for rental purposes was largely reduced. You have the evidence upon that proposition. This action was commenced on April 4, 1914, and she sues for diminished rental value for the three years before the commencement of this action. In addition to that, gentlemen, the plaintiff is entitled to recover for any inconvenience and for any actual and necessary expenses incurred by her by reason of the pollution of this stream and the pollution of this well, as set out in the petition, by the defendant, if you in fact find that the defendant did so pollute the well.

"Now, when I say she is entitled to actual and necessary expenses incurred by reason of the pollution of this stream and by reason of the well, that does not mean that she could extend beyond what was necessary to install water on the land."

We think it will be conceded as a fundamental and a well

## Coal Co. v. Koontz.

established principle of law that an owner of land has the right to enjoy the soil itself and the incidents thereto in its natural state unaffected by the tortious acts of a neighboring landowner, and where the land is located in such a way that a natural stream of water passes through it, the owner of the land, as a riparian owner, is entitled, as an incident to his estate, to the natural flow of the water of the stream in its accustomed channel, undiminished in quantity and unimpaired in quality.

We further think that it is a sound principle of law that in an action for damages to real property testimony is admissible to show the exact character of the injury suffered, whether of a permanent or irreparable nature, or of the sort susceptible of repair, so that the property may be restored to its original condition. If the testimony shows the former to be the nature of the injury, the measure of damages is the difference in value of the property before and after the injury. If an injury susceptible of repair has been done, the measure of damages is the reasonable cost of restoration plus the reasonable compensation for any loss of the use of the property between the times of injury and restoration, unless such cost of restoration exceeds the difference in values of the property before and after the injury, in which case the difference in value becomes the law.

The court is of the opinion that the principles of law hereinbefore referred to are well established in this state and we think we need refer to but one case, *Straight v. Hover*, 79 Ohio St. 263 [87 N. E. Rep. 174; 22 L. R. A. (N. S.) 276]. The second syllabus reads as follows:

"An upper owner of lands upon a running stream who operates them for underlying petroleum by pumping it and the salt water with which it is commingled into tanks, and, after the petroleum rises, withdrawing the salt water from beneath and discharging it by gravity into the stream is liable in compensatory damages for such substantial injuries as may be sustained by a lower proprietor in consequence of the water in the stream being thereby rendered unfit for the use of live stock and destructive of the grass with which it comes in contact, although such operation is conducted with care and in the only

## Perry County Appeals.

known practicable mode of developing the mineral resources of his lands."

It is urged by the plaintiff in error that under no rule of damages was the plaintiff below entitled to recover for anything, save and except the diminution in the market value of the property. We do not agree with counsel for plaintiff in error in this claim. We think that the measure of damages in the present case includes the permanent injury to the land, the diminution in rental value and the cost of installing another supply of water. In other words, the recovery is limited to the actual damages incurred in the premises as shown by the evidence.

We have examined, with some care, the charge of the court, and we have no hesitancy in saying that we find it to be a clear and concise statement of law governing the facts pertaining to the issues in the case, and that it fully and completely covers all of the questions involved therein.

Viewing the case as we do, and finding the recovery to be the result of proof offered, tending to show the actual damages sustained by the plaintiff below, and finding no error in the record prejudicial to the rights of the plaintiff in error, there is but one thing for the court to do; and that is to affirm the judgment below, which we now do.

**Powell and Shields, JJ., concur.**

Theurkauf v. Wright.

### LICENSES—INTOXICATING LIQUORS.

[Hamilton (1st) Court of Appeals, January 31, 1916.]

Jones, Jones and Gorman, JJ.

JULIUS THEURKAUF V. ROGERS WRIGHT, ET AL.

Liquor License Board not Answerable for Refusal to Grant License.

Liquor licensing boards perform quasi judicial functions, and can not be held answerable in damages for errors or mistakes, if any are made, in the exercise of their functions.

ERROR.

*H. P. Karch*, for plaintiff in error.

*Ellis G. Kinkad, John A. Deasy, Timothy S. Hogan*, for defendants in error.

**GORMAN, J.**

The action below was brought in the superior court of Cincinnati by plaintiff in error against Rogers Wright and William Marscheusser as the Hamilton County Liquor Licensing Board, and Charles L. Allen, Byron M. Clendenning and J. H. Secrest as the Ohio State Liquor Licensing Board, to recover \$20,000 damages for their alleged wrongful refusal and neglect to grant to plaintiff a license to traffic in intoxicating liquors in Cincinnati for the year beginning November 24, 1913, upon his application therefor duly filed in writing as provided by law; and plaintiff averred that although he possessed all the qualifications requisite in law to entitle him to a license, said boards rejected his application solely on the ground that the number of licenses which could be issued under the constitution and the laws had been exhausted and there were no more licenses to grant. Plaintiff averred that he was one of those favored under the laws as entitled to a license because of his good standing and the length of time he had been engaged in the business prior to November 5, 1913. He claimed that as the direct result of the refusal of defendants to issue to him a license he was damaged in the sum above stated and prayed judgment therefor.

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A demurrer to plaintiff's second amended petition was interposed by defendants and sustained by the trial court and the plaintiff not desiring to plead further, his petition was dismissed.

It is claimed that in this ruling the court below erred.

This court is of the opinion that the court below did not error in sustaining the demurrer.

In 23 Cyc. 125, this rule is laid down:

"Licensing officers are not to be held answerable for mere mistakes or errors of judgment; But they are subject to indictment when their action in granting or refusing licenses was prompted by corrupt motives amounting to a gross abuse of discretion at a plain dereliction of duty. They are not personally liable in an action at law against them to recover damages alleged to have been sustained by their refusal to grant a license to plaintiff; the latter if clearly entitled to a license, may enforce his rights by mandamus, but the proceeding on his application is so far judicial as to protect officers from civil actions for damages," etc. Citing *Halloran v. McCullough*, 68 Ind., 179.

Under the law (103 O. L. 216-242 inclusive) the county licensing board has something more than ministerial duties to perform; it has quasi-judicial functions to perform; it must look into the character and qualifications of applicants for licenses, grant licenses, which shall not exceed in number one for every five hundred inhabitants of the county and perform many other acts calling for an exercise of discretion and judgment. They can not be held answerable in damages for errors or mistakes made by them in the exercise of such functions.

Most of the questions raised in this case were decided adversely to the contention of plaintiff in error by the Supreme Court in the case of *Meyer v. O'Dwyer*, 90 Ohio St. 341 [107 N. E. Rep. 759].

**Judgment affirmed.**

**Jones and Jones, JJ., concur.**



Fagins v. Realty Co.

### NEGLIGENCE—ICY SIDEWALKS.

[Cuyahoga (8th) Court of Appeals, February 7, 1916.]

Meals, Grant and Carpenter, JJ.

AGNES FAGINS V. BLOCH REALTY CO.

**Permitting Sidewalk to Become Icy in Violation of Ordinance, Does not Impute Wantonness or Wilfulness, Cutting off Defense of Contributory Negligence.**

An inference of wantonness or wilfulness, cutting off the defense of contributory negligence, cannot be imputed from a property owner's permitting the sidewalk in front of his premises to become covered with ice in violation of municipal ordinances, from which a pedestrian, injured while voluntarily and knowingly attempting to pass over such icy sidewalk, is excused from the exercise of ordinary care to avoid the injury; the failure to obey the ordinance and permitting the ice to accumulate in the first place were coincident but not different things, and do not introduce the rule of wilfulness.

ERROR.

*A. H. Martin*, for plaintiff in error.

*Ford, Snyder & Tilden*, for defendant in error.

GRANT, J.

In this proceeding we are asked to reverse the judgment of the court of common pleas, following a verdict directed by that court, upon the conclusion of the plaintiff's testimony.

As being substantially correct, we adopt as our own the statement of the plaintiff's brief as to the issues joined by the pleadings in the case, as follows:

"Agnes Fagins, as plaintiff in the common pleas court, brought her action against the Bloch Realty Company, as defendant, and charged in her petition that the said defendant, being the owner and in possession of a certain tall brick building abutting on Walnut Avenue, Cleveland, O., on January 26, 1915, had constructed and maintained a certain down spout on said building which was inadequate to and which failed to properly conduct the water from the roof of said building to the sewer, but permitted the water accumulating on said roof

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to overflow and flow down the outside of said down spout and to be discharged on the surface of the sidewalk on Walnut avenue and to flow across the sidewalk eastwardly therefrom to the gutter, and so flowing to freeze and form an accumulation of ice in ridges on said sidewalk,—causing the same to be dangerously obstructed, all in negligent, wanton disregard of the laws and ordinances of said city. That on said date she, the plaintiff, while lawfully proceeding along said sidewalk as a pedestrian, in the exercise of due care, slipped and fell on said sidewalk, because of said icy obstruction and defect and suffered serious permanent injury to her right knee rendering her a permanent cripple. And charged that the defendant thereby had wantonly, negligently and in violation of the laws and ordinances of the city, inflicted said injuries upon her to her damage, and prayed judgment accordingly.”

The defendant in its brief says that the plaintiff's statement of the facts which the testimony offered at the trial tended to prove, is also correct in substance; wherefore we adopt that also as ours, as follows:

“On January 26, 1915, at about 11:30 A. M., Agnes Fagins, plaintiff in error, a woman in her 57th year of age, was walking westward on the sidewalk on the North side of Walnut avenue, Cleveland, Ohio, ‘as carefully as she could’ in the business of collecting washings,—she being a washerwoman—on her way to the Hanna Flats. Water accumulating on the roof of the Hanna Flats had backed up,—the down spout being clogged and overflowed and instead of being conducted down the inner side of the down spout to the sewer, ran down the outside of the easterly down spout and was discharged upon the surface of the sidewalk and ran across the sidewalk to the street. In so doing it froze on the down spout and upon the sidewalk from time to time and caused an accumulation of ice, forming in ridges and unevenly across the sidewalk, being almost a foot thick or high at the side of the building at the end of the down spout and ranging from that thickness to three or four inches thick at the curb and extending entirely across the sidewalk from the building to the curb, and extending of the same width,

## Fagins v. Realty Co.

eastwardly toward E. Twelfth street, from the down spout about eight or twelve feet. The sidewalk from the building and down spout to the curb is about ten feet wide. A pedestrian, in order to avoid the ice, passing along said sidewalk going to said Hanna Flats would have to leave the sidewalk at a certain drive about twelve feet east of the down spout on the southeasterly end of said flats and pass into the street outside of the curb and travel about eighteen feet before returning to the sidewalk to enter the building. This accumulation of ice which made the sidewalk unsafe and dangerous was permitted to remain for about five days after the attention of the defendant's manager was called to it and before plaintiff was injured by falling thereon.

The attention of the defendant's manager was called to this accumulation of ice which made the sidewalk unsafe and dangerous about five days immediately prior to the day of the plaintiff's injury, but nothing was done to remedy said condition.

When within a very short distance,—'four or five steps'—or about 'three feet' of the Hanna Flats, the plaintiff slipped and fell on the accumulation of ice. She had gathered washings from the "Hanna" for several years. She had passed over this sidewalk on the day before (Monday) several times. At the time of her injury observing the icy, uneven, rough, slippery condition of the sidewalk, she walked as best she could,—being compelled to go after her work and being unable to stop. On Tuesday, the day of her fall, it was a little warmer than it had been, causing some thawing and a larger flow of water than on the preceding days. There was no other equally direct and convenient way to her destination open to plaintiff. She sustained, as a result of the fall, a very painful injury to her right knee and foot, rendering her prostrate, helpless and unable to walk. Also a painful, persistent swelling and inflammation and a fluid effusion in the bursa about the knee joint. A severe sprain and a tearing of the ligaments about the knee joint, a displacement of the two cartilages of the knee and a latent, quiescent, congenital, syphilitic taint in the blood was revived

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and rendered active and a necrosis of the head of the tibia ensued,—rendering said plaintiff a helpless cripple, permanently incapacitated from using her right leg and from following her usual vocation.

The defendant, The Bloch Realty Company, owned and was in possession and control of the building, the Hanna Flats, and maintained the down spout from which the water came, which frozen caused the said icy condition on the sidewalk on which plaintiff fell.

Section 670 and 241 of the Building Code of Cleveland, making it a misdemeanor, punishable by a fine and imprisonment to, in any case, permit the discharge of water from the roof of a building upon and across the sidewalk."

The judgment complained of was entered after a motion by the plaintiff for a new trial had been made and overruled.

A single question, therefore, arises upon this record for our determination—having a proper regard for all that the testimony relevantly tends to prove, when brought to bear upon the issue joined, and allowing all proper inferences to be deduced from it, still was there anything fit to go to the jury in support of a verdict for the plaintiff? Whatever the trial may have remarked as to the controlling state of the law in Ohio upon which he took the case from the jury, the justification for doing so is to be found, if at all, in the admitted facts that the plaintiff came to her injuries from going into a place of danger plainly visible to her at the moment and which she might without difficulty have avoided. And this is no more than saying that her hurts were brought upon herself as the result of her own negligence, causing or materially contributing to them.

And, if such is the rule, we think she fairly brought herself within its application, concretely, to her case. She testified that the icy condition of the sidewalk was plainly to be seen when she went upon it and was injured, and that it was so to her knowledge the day before, when also she had occasion to pass that way several times.

Such being the admitted fact, the case seems to be governed by *Schaefer v. Sandusky*, 33 Ohio St. 246 [31 Am. Rep. 533], of which the syllabus is as follows:

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"A person who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, cannot be regarded as exercising ordinary prudence, and, therefore, cannot maintain an action against the city to recover for injuries sustained by falling upon the ice, even if the city would otherwise have been liable."

There is nothing more in the facts of the case at bar that should have sent it to the jury than there was in the one just cited. In that case the controlling facts were disclosed by the answers of the jury to certain special interrogatories sent to them, as follows:

"Q. Did plaintiff see and know the nature and character of this obstruction before and at the time of passing over it? And did he, knowing this, voluntarily pass over it?

"A. He did.

"Q. Could he have easily avoided it, either on the same work, in the street, or on the opposite side, or on any other sidewalk, and reach his destination?

"A. He could have avoided it."

On these findings the court in that case rendered judgment for the defendant, although the general verdict was for the plaintiff. And the Supreme Court upheld the judgment.

Here, the same facts were established by the admissions of the plaintiff, a result certainly not less satisfactory than the findings of a jury.

The rule stated has been followed by the Supreme Court in *Conneaut v. Naef*, 54 Ohio St. 529 [44 N. E. Rep. 236], and in *Norwalk v. Tuttle*, 73 Ohio St., 242 [76 N. E. Rep. 617], as well as in numerous affirmed circuit court cases. It must, therefore, be regarded as the settled law of the state in this respect, conclusive in the case before us, and properly applied by the trial court.

In the case at bar the negligence of the plaintiff, contributing to her injury, was so far the efficient cause of that injury that but for it she would not have been injured, and by the exercise of ordinary care for her own safety she could have

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avoided the injurious consequences of the initial negligence of the defendant company. See remarks of Williams, J., in *Schweinfurth v. Railway*, 60 Ohio St. 215 [54 N. E. Rep. 89], at p. 222, quoting with approval Thompson, Negligence to the effect we have just stated.

It is, however, claimed by the plaintiff that the doctrine has no application where the circumstances are such that a jury might find from them that the conduct of the defendant in permitting the sidewalk to become covered with ice contrary to law should raise an inference of wantonness or wilfulness and bring that as a dominating issue of fact into the controversy. The contention at this point is that the unlawful negligence of the defendant amounted to a reckless disregard of the plaintiff's right to a safe passage over the sidewalk, which made wilfulness the controlling ingredient of legal wrong and took the ordinary doctrine of contributory negligence as a decisive factor out of the case. Such is the argument, which is fortified by extensive citations of authorities.

This doctrine is shortly but completely stated in 7 Am. & Eng. Enc. Law 443 (2 ed.) thus:

"The doctrine of contributory negligence has no application in cases where the injury is inflicted by the wilful act or omission of the defendant; in such cases contributory negligence is not a defense and, in its legal sense, cannot exist.

"Wilfulness and negligence are the opposites of each other, the one signifying the presence of intention or purpose, the other its absence."

And in 1 Sherman & Redfield, Negligence, 64, it is said: "It is universally conceded that the greatest contributory fault, including a wilful trespass, is no defense in an action for wilful injury." And it is contended that when the efficient cause of the injury—in this case an icecovered sidewalk—is brought about by the disobedience of an ordinance on the part of the defendant, wilfulness is thence to be imputed to it as matter of law, conclusively to the effect of cutting off the defense it might otherwise have of contributory negligence on the plaintiff's part. At least, it is said, it was a question for the

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jury. An examination of the authorities brought forward to support this contention, leads us to the conclusion that the doctrine, applied to the case in hand, is unsound. The rule seems to be limited to cases where the initial fault of placing himself in a place of peril was that of the plaintiff, and where the resulting injury arose from the defendant's reckless and wanton act or omission—amounting in law to wilfulness—then first coming into the situation and bringing about the hurts complained of. Here, the failure to obey the ordinance did not come into the case as the direct cause of the injury as an intervening agency primarily responsible for it; it was there in the first instance, as a usual and ordinary manifestation of negligence, and the fact that it at the same time was a violation of an ordinance was a coincidence and not an independent basis of recovery. Because the omission to obey the ordinance and the permitting of ice to accumulate in the first place were coincident but not different things, does not, as we think, introduce the rule of wilfulness in the case. The line of distinction seems nebulous at first glance but it exists and is perceivable from an analysis of the cases cited in the briefs.

Upon the plaintiff's testimony we think there was nothing to go to the jury and that the verdict was properly directed.

No error having intervened, the judgment complained of is affirmed.

**Meals and Carpenter, JJ., concur.**

## Columbiana County Appeals.

## PARENT AND CHILD.

[Columbiana (7th) Court of Appeals, April 8, 1915.]

Houck, Pollock and Metcalfe, JJ.

(Judge Houck of the 5th district sitting in place of Judge Spence.)

WILLIAM ELEM V. STATE OF OHIO.

Knowledge of Child's Need Imputed to Parent and Demand for Maintenance not Prerequisite to Prosecution for Failure to Provide for Child.

A parent who is able by reason of property, labor or earnings to provide care or maintenance of his or her child under sixteen years of age, may, under Sec. 13008 G. C. be convicted of failure so to do without proof of notice that the child is in need or of a demand or request that such care or maintenance be provided.

*George T. Farrell*, for plaintiff in error.

*William H. Vodrey*, Pros. Atty., for defendant in error.

## HOUCK, J.

This cause is here on error from the common pleas court of this county, seeking to reverse a judgment of conviction, wherein the plaintiff in error, the defendant below, was convicted upon an indictment in which he was alleged to have failed, neglected and refused to furnish food, clothing, proper care and maintenance, to and for his bastard child, the indictment and conviction being under favor of Sec. 13008 G. C., which is as follows:

"Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects and refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

The defendant below was tried and convicted. A motion



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for a new trial was filed, heard and overruled, and to the overruling of the same the defendant prosecutes error to this court, seeking a reversal of the judgment below.

Counsel for the accused contends that the evidence offered in the case does not show or prove that the accused is the father of said bastard child; and, further, that no demand or request was made at any time by any one for him to support or maintain said child, and therefore the verdict of the jury is against the weight of the evidence, and contrary to law.

The statute in question was enacted by our legislature for a purpose, and we think it is a proper and humane one, and is for the purpose of aiding and protecting communities and society to bring about the proper care and support of children by parents, whether they be born in or out of lawful wedlock, if the parent has the means and property for so doing, which the record shows the defendant possessed at this time.

Speaking from the record in this case, the accused associated with and kept the company of the prosecuting witness. He had sexual intercourse with her, and gratified his passions and desires, and is therefore not only morally, but legally responsible for his acts and conduct, which, in this case, resulted in bringing into this life a bastard child, and is chargeable for its maintenance and support if he is proven, under the evidence, applying the proper rules of law thereto, to be the father of said child. We have examined the record and the testimony. The defendant below was represented by able counsel, and he had a fair and impartial trial.

It is the claim of counsel for the accused that the judgment below should be reversed. We think there is but one proper and reasonable answer to this, in the face of the record and the law applicable to the case at bar.

It is a well established principle of law in this state that a father is bound to know when his child is in need of food, clothing, care and support. He, being the father, is not only required to, but in law is bound to know it, and the law does not require him to be notified of that fact. The father owes to himself and the public the duty of taking care of and support-

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ing his child, and the fact that no one called his attention to the needs of the child does not remove his moral, and his legal obligation as well, to his offspring, under the section of our statutes heretofore referred to.

It will be noticed that the statute under favor of which the accused was tried and convicted does not, by any terms therein, require that a demand or request shall be made upon the father for the performance of the duty enjoined and required of him in said statute. Nor, if effect is given to all the terms thereof, does it appear that such demand, or notice, or request, is required by implication.

We believe that these principles of law are sound; and applying them to the facts and evidence as disclosed by the record in this case, so far as this court is concerned, we are of the opinion that the defendant was properly and legally convicted, and that the verdict of the jury and judgment of conviction should stand, and that the defendant must atone to the offended law.

The judgment below is affirmed.

Pollock and Metcalfe, JJ., concur.

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ASSESSMENTS—SEWERS.

[Hamilton (1st) Court of Appeals, November 29, 1915.]

Jones, Jones and Gorman, JJ

HORATIO W. BURKHARDT, ET AL. V. CINCINNATI (CITY), ET AL.

**Acreage Tract Subject to Assessment for Sewer Notwithstanding Present Buildings cannot be Connected.**

Where an acreage tract can be so subdivided into lots fronting on a street in which a sewer has been laid as to render the sewer available for said lots, an assessment for the cost of the sewer will be sustained to the extent of the average depth of such lots, notwithstanding the buildings at present on the tract could not be connected with the sewer.

*Black, Swing & Black*, for plaintiffs.

*Walter W. Schoenle, Frank K. Bowman*, city solicitor, for defendants.

## Burkhardt v. Cincinnati.

**JONES, O. B., J.**

Plaintiffs own a tract of land of about seventeen acres, not subdivided into lots, lying on the northwesterly side of Madison road. It is now improved with but one dwelling house thereon which is located south of the center and fronts towards Madison road, and which has no sewer connections, the house drainage being carried into a cess pool. The eastern boundary is Vista avenue which runs northwardly from Madison road. the natural drainage of the land is to the west and south.

Under certain proceedings of the council of the city of Cincinnati, commenced by the resolution declaring it necessary to improve by sewerage passed December 27, 1910, sewers were constructed in certain streets including that part of Vista avenue abutting 280 feet along the northern part of plaintiff's property, and an assessment was levied on each front foot of the lands abutting thereon of \$1.60 to pay the cost and expense of such improvement, by an ordinance passed November 13, 1911.

Under a contract dated April 11, 1913, plaintiffs granted to the city of Cincinnati the right to construct and maintain a trunk sewer through the western part of their land, which should carry off the surface drainage and storm water of the adjoining lands, and plaintiffs were given the right to tap such sewer without assessment or charge to them for the purpose of connecting such tributary sewers as they might thereafter see fit to build in accordance with city specifications, for the sewerage and drainage of their property as it should be developed. Madison road was also improved by the construction of a sewer therein.

Plaintiffs seek in this action to enjoin the collection of the assessment for the Vista avenue sewer on the ground that it can be of no benefit to their property because it is only three to four feet below the basement of the present residence, and that their premises do not need local drainage and are otherwise sufficiently provided therewith Sec. 3819, G. C.

It would probably not be practical to use this sewer in Vista avenue for the house drainage of the present residence because

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of its depth and the fact that it is so far from the residence, and the natural topography would make a sewer connection preferable either with the sewer in Madison road or with the trunk sewer in the ravine in the western part of the premises. But the property might be so divided as to lay out lots on Vista avenue fronting that part in which the sewer is laid, and houses built thereon could be so constructed as to tap and use this sewer; and under the doctrine of *Cincinnati v. Bickett*, 26 Ohio St. 49, and *Ford v. Toledo*, 64 Ohio St., 92 [59 N. E. Rep. 779], the assessment for this sewer should be sustained. In levying the assessment against this property council should have fixed the depth to which the lien would attach to the fair average depth of lots in the neighborhood, (Sec. 3813 G. C.) If so desired, that may be fixed now in the decree.

It appears to the court that if the present arrangement for the sewerage of these premises had been in existence at that time, so far as this property is concerned that part of Vista avenue abutting it might have been omitted; but there is nothing before the court to show that it may not have been necessary for the drainage of property on the opposite side of Vista avenue.

This improvement had been made and the assessment levied some time before the sewerage contract was entered into between plaintiffs and the city, and the fact that it was not mentioned in that contract leads to the belief that it was not intended by the parties that the arrangement made therein should in any way affect the validity of the Vista avenue assessment. It must therefore be held legal, and plaintiff's petition is dismissed.

Jones, E. H., and Gorman, JJ., concur.

Haas v. Haas.

## ATTACHMENT AND GARNISHMENT.

[Stark (5th) Court of Appeals, February 8, 1916.]

Shields, Powell & Houck, JJ.

JOHN HAAS v. GEORGE HAAS.

1. Voluntary Payment, Upon Written Demand, to One Creditor for Necessaries no Bar to Garnishment by Another Creditor.

Voluntary payments made by a debtor from his personal earnings on a claim against him for necessities, even though a demand has been made on him for such payments, but where such voluntary payments, were made to his creditor without any suit in attachment being filed against him, do not, under Secs. 10271 and 10272 G. C., preclude a subsequent attaching creditor upon a claim for necessities from reaching and subjecting ten per cent of such debtor's personal earnings.

2. Purpose of Statute to Reach Personal Earnings of Debtor not to Voluntary Payments.

Voluntary payments made after such demand, relieve the debtor from the consequences of a contested suit and costs; but construing Secs. 10271 and 10272 G. C. together, it appears that the provisions thereof were intended to apply to and become effective in cases where action is brought to reach the personal earnings of the debtor, and not to cases where voluntary payments are made without pending or prior attachment proceedings.

ERROR.

*J. W. Burris*, for plaintiff in error.

*Fisher & McCuskey*, for defendant in error.

## PER CURIAM.

Proceedings in attachment were instituted before a justice of the peace to reach 10 per cent of the personal earnings of the debtor for necessities. It appears that at the time such proceedings were commenced, the debtor was making voluntary payments of his personal earnings to another creditor for necessities, and who had threatened to sue and garnishee his wages upon written demand made therefor. Such attachment was discharged by the said justice of the peace, and on an appeal taken to the court of common pleas, said court reversed the judgment of the said justice of the peace discharging said judgment and ordered said case remanded to the said justice of the

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peace for further proceedings. Error proceedings are prosecuted to this court to reverse the judgment of said common pleas court.

By Sec. 10233 G. C., a remedy is afforded for the attachment of the personal earnings of a debtor when an affidavit is filed with a justice of the peace conforming to the requirements therein stated. This is the general provision provided by statute. Section 10271 G. C., as amended, 103 O. L. 567, provides that:

"The personal earnings now exempted by law, in addition to the 10 per cent for necessities, shall be further liable to the plaintiff for the actual costs of any proceeding brought to recover a judgment for such necessities, in any sum not to exceed two dollars and the necessary garnishee fee. Such garnishee may pay to such debtor an amount equal to ninety per cent of such personal earnings, less the sum of two dollars and the necessary garnishee fee of not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs as herein provided, due at the time of the service of process or which may become due thereafter and before trial and be released from any further liability to such creditor, or to the court or any officers thereof, in such proceeding, or in any other proceeding, brought for the purpose of enforcing the payment of the balance of the costs due in said original action. Both the debtor and the creditor shall likewise be released from any further liability to the court or any officers thereof in such proceeding or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action."

Section 10272, G. C., provides that:

"The person bringing an action for necessities first must make a demand in writing for the excess over and above 90 per cent of the personal earnings of the debtor, and such demand shall be made at least three days and not more than thirty days before such action is brought by delivering such demand to the debtor personally, or by leaving it at the debtor's usual place of residence. No cost or expense shall be chargeable to the defendant debtor in such action if upon such

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demand he tenders payment in money or duly accepted order, within three days after such demand, for the excess of his personal earnings above 90 per cent thereof.

Section 10273 G. C., provides that:

“More than one such demand by the same creditor shall not be made at closer periods than thirty days. The amount demanded may be for the excess above 90 per cent earned during the interval of thirty days. Any voluntary payment or payments made by the debtor during such interval shall be deducted from the amount which might be demanded had no payment or payments been made.”

Other statutory provisions follow with reference to the duties of the garnishee, but the foregoing sections will suffice for the purpose of this case. Related as they are to the same subject-matter, we may well assume that these several sections of the statutes are to be construed together to ascertain the object of their enactment, and when so construed the legislative intent, in our judgment, will not be difficult of solution.

The foregoing legislation was obviously passed in the interest of creditors furnishing necessities to persons whose personal earnings were theretofore protected by the exemption laws of the state, and while not saving to the debtor's family the full benefit of his labor, a small proportion of it is exacted by the law to be applied towards satisfying the claims of the grocer or other person who may supply necessities for his table and household. Legislation of this character has gradually found place upon our statute books from time to time until now it is provided by said Sec. 10271 that in addition to the per cent of such earnings heretofore held liable for necessities, such earnings shall be liable for costs in a sum not to exceed two dollars in an action brought by a creditor on a claim for necessities.

The demand mentioned in said Sec. 10272 G. C. is held to be jurisdictional, hence unless such demand is made as therein required, if suit be brought, the attachment can not be maintained, for said section recites that “no cost or expense shall be chargeable to the defendant debtor in such action, if upon

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such demand he tenders payment in money or duly accepted order, within three days after such demand, for the excess of his personal earnings above 90 per cent thereof." It would seem that this latter provision of said section was intended to relieve the defendant debtor from the consequences of a contested suit by the creditor. As will be seen said Sec. 10273 provides that not more than one demand by the same creditor shall be made at closer periods than thirty days. Grouping said sections together, then, we find that after written demand is made within the time stated, and in the absence of payment being made or tendered, or an accepted order given for the excess of the debtor's personal earnings above 90 per cent thereof, suit may be brought therefor and a recovery had, together with the further sum of two dollars as costs, provided that no more than one such demand by the same creditor shall be made at closer periods than thirty days.

Here we have the question made whether one can make voluntary payments under a demand made for necessities, in the absence of suit, and thus absolve himself from complying with compulsory process issued by another creditor upon a claim for necessities furnished to the same defendant debtor while such voluntary payments are being made, at intervals of thirty days, or in other words, can such voluntary payments so made defeat a creditor from enforcing payment of his claim for necessities furnished in an action commenced by the latter while such voluntary payments are being made? Construing Secs. 10271 and 10272 together it appears that the provisions of said sections were intended to apply to and become effective in cases where action is brought to reach the personal earnings of a debtor for necessities furnished, and not to cases where voluntary payments are made. Voluntary payments may be made but not so as to defeat the rights of an attaching creditor under the statute, for if it were otherwise the provisions of the statute and what seems to have been the purpose of this legislation would be rendered ineffective and nugatory.

It follows that the judgment of the court of common pleas will be affirmed.



**Varsey v. Varsey.**

**APPEAL—DIVORCE.**

[Lorain (8th) Court of Appeals, March 20, 1916.]

Meals, Grant and Carpenter, JJ.

**BENJAMIN F. VARSEY v. LILLIAN VARSEY.**

**Order in Divorce Proceedings Affecting Custody of Children Held Appealable.**

The custody of children is inherently equitable in its nature and within the term "Cases in Chancery" in Art. 4. Sec. 6 of the constitution establishing the court of appeals; hence, notwithstanding Sec. 12002 G. C. denies the right of appeal in divorce with certain exceptions, in which custody of children is not excepted, appeal does lie to an order in a divorce proceeding affecting the custody of minor children.

APPEAL.

*C. G. Washburn*, for plaintiff.

*David Perris* and *Wm. G. Stuber*, for defendant.

**CARPENTER, J.**

The defendant has appealed this case to this court so far as the decree of the court of common pleas relates to the custody of Russell Albert Varsey, minor child of plaintiff and defendant.

The question before this court arises out of the motion of the plaintiff to dismiss the appeal, for the reason that this court has no jurisdiction to entertain the same, by reason of its not being appealable under the provision of Art. 4, Sec. 6, of the constitution establishing the court of appeals.

It is provided therein that courts of appeals have appellate jurisdiction in the trial of chancery cases. It will be observed that Sec. 12002 G. C. provides that no appeal will be allowed from a judgment or order of the common pleas court in a divorce case, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony, or where an injunction has been granted under Sec. 12001.

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Section 8033 provides: "Upon hearing the testimony of either or both of such parents, \* \* \* the court shall decide which one of them shall have the care, custody and control of such offspring."

Section 8035 provides: "An appeal to a higher court may be had upon appellant giving bond \* \* \*."

In the case of *Bower v. Bower*, 90 Ohio St., 172 [106 N. E. Rep. 969], the syllabus reads as follows:

"An appeal will lie from a judgment or order of a court for the care, custody and maintenance of minor children regardless of whether such order is made in an action for divorce, divorce and alimony or alimony only, or in proceedings under the provisions of Sec. 8032 G. C.

Notwithstanding the court in the foregoing case bases the right of appeal upon statutory grounds, yet it is somewhat suggestive of the legal characterism pertaining to the custody of children by the courts. In the case of *Rogers v. Rogers*, 51 Ohio St. 1 [36 N. E. Rep. 310], Judge Spear in his opinion speaks of the authority of a court over the matter of custody of children in divorce proceedings as probably being inherent but it is given by the divorce statute. And the court in the memorandum opinion in the Bowers case speaks of jurisdiction in such matters as being "incident to the suit." If this right adhered to the court by reason of being an inherent right, is it not quite suggestive that the statute was a mere codification of that right?

It does not follow that where a class of cases is within the jurisdiction of chancery, that jurisdiction in chancery is taken away because courts of law subsequently give a remedy. *Cram v. Green*, 6 Ohio 429. Accordingly, our Supreme Court has held that notwithstanding partition proceedings are regulated by statute in Ohio, yet they are inherently chancery cases, having been so classed by the courts of England, and are therefore appealable to the courts of appeals.

In the case of *Sullivan v. Thomas*, 3 S. C. 531, the court in its syllabus says:

"By the term, cases in chancery, as used in Art. 4, Sec. 4

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of the constitution, declaring the jurisdiction of the Supreme Court, is meant such cases as were cognizable by the courts of equity of the state existing at the time of the adoption of the constitution."

In the opinion the court says:

"It must be premised that the jurisdiction of this court, so far as it was ascertained and fixed by the constitution is unaffected by the provision of the code of procedure or any other statutory law. Again, the terms employed to mark out that jurisdiction must be taken in the sense in which they were understood at the time the constitution was adopted. Thus, for instance, the term 'cases in chancery' at the time, meant cases of a class of which the court of chancery could entertain jurisdiction although since that time the court of chancery has been abolished and its jurisdiction conferred upon the court of common pleas. Yet, what was intended to be described as 'cases in chancery' must be determined now, not with reference to the present statute of jurisdiction and forms of procedure, but by the inquiry whether any given case could have been regarded, at the adoption of the constitution, as a 'case of chancery.' When the nature of the right in controversy, or of the relief sought in any case is such that, prior to the code, it would have been appropriately pursued in the court of chancery, it will be regarded as within the expression 'cases of chancery.'

The circumstance that forms of proceedings, as it regards law and equity, are assimilated under the code, does not affect the jurisdiction of the court as established under the constitution; but we look to the substantial character of the controversy before us for the purpose of ascertaining the extent of the powers in relation to such case, rather than to the nature of the court from which the case comes or the technical mould in which the case is cast."

That divorce and alimony cases were not recognizable in the court of chancery in England, is verified by the following excerpt from the opinion in the case of *DeWitt v. DeWitt*, 67 Ohio St. 340, 344 [66 N. E. Rep. 136]:

"We gather from a somewhat extended examination of

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authorities that, in so far as we derive any common law rules respecting divorce and alimony from the mother country, we inherited those administered in the ecclesiastical courts, for, outside of parliament, no other tribunal had or assumed cognizance of such controversies. Such power did not, in England, belong to a court of equity. The ecclesiastical court was not, and never had been, a court of equity. It was a canonical court, and never deviated from the canon law. \* \* \* 'The court for divorce and matrimonial causes owes its jurisdiction—in part original and in part derived from ecclesiastical courts—to the act of parliament by which it was created, and the several amending acts by which that jurisdiction has been in various ways altered and amplified.' \* \* \* It may be fairly claimed, from the foregoing, that the courts of Ohio have not general equity jurisdiction in suits for alimony, but that the jurisdiction is such, and such only, as is given by the statute. \* \* \*

It will be noticed that in the entire opinion no mention is made regarding the custody of children, and it is quite suggestive that the legislature deemed it proper to enact a separate statute, as it were, to avoid confusion in the administration of justice. Having demonstrated by authority that divorce and alimony were not matters in chancery, it yet remains to determine whether the custody of children was in fact recognizable in courts of chancery. That that was so we find in 9 Eng. & Am. Enc. Law 866:

"The ecclesiastical courts had no power to determine the custody of the children, as at common law the court of chancery has jurisdiction in such cases. Where jurisdiction to grant divorce is conferred upon a common-law court, such court will have only such powers as to the custody of the children as are conferred by the divorce statute. But where the jurisdiction is conferred upon a chancery court it will have full power to fix the custody of the children, aside from the special provisions of the statute.

"On granting a divorce it is the duty of the court to protect the interest of the state by providing for the custody and

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support of the children, and this may be done although neither party has prayed for such relief.

"The statutes in the various states of the United States and in England give the courts power to provide for the custody and maintenance of the children of the parties pending the suit for divorce.

"Courts having chancery jurisdiction may make such orders by virtue of the general jurisdiction in equity although the statutes are silent as to such remedy or merely provide that the custody may be awarded after a divorce is granted."

Again in the case, *Morgan, In re*, 117 Mo. 249 [21 S. W. Rep. 1122; 22 S. W. Rep. 913]:

"Divorce and alimony, part of this jurisdiction, belonged to the ecclesiastical courts in former times in England, and the power to make awards as to the custody of children is a part of the ancient chancery jurisdiction."

Counsel for plaintiff has not referred us to any decision contrary to the foregoing, and knowing his accustomed diligence in preparation of cases, we may infer that there are none.

For the foregoing reasons, and upon the authorities cited, we hold that the custody of children is inherently equitable in its nature, having such characteristics and cognizable in a court of chancery, all of which, we think, brings it within the comprehension of the clause "Cases in Chancery" in Art. 4, Section 6 of the constitution of this state.

The motion of the plaintiff is therefore overruled.

**Meals and Grant, JJ., concur.**

## Mahoning County Appeals.

## LIBEL AND SLANDER.

[Mahoning (7th) Court of Appeals, October 18, 1915.]

Houck, Pollock and Metcalfe, JJ.

(Judge Houck of the 5th district sitting in place of Judge Spence.)

G. M. McKELVEY CO. v. DAVID M. NANSON.

Not Libelous per se as Affecting Trade Relations to Publish That  
Tradesman Suddenly Decided to Retire from Business.

A publication by a tradesman is not libelous on its face, where  
to the effect that Mr. N. had "suddenly decided to retire from  
the tailoring business," coupled with the announcement to the  
trade that his entire stock had been purchased for cash.

[Syllabus by the court.]

## ERROR.

*Hine, Kennedy & Manchester* and *S. S. Conroy*, for plain-  
tiff in error.

*Kennedy & Mumaw*, for defendant in error.

## HOUCK, J.

This is a proceeding in error, by the plaintiff in error, seeking to reverse a judgment of the court below in favor of the defendant in error, in an action brought by him against the said plaintiff in error, for libel.

The article complained of was published in two newspapers of general circulation in the city of Youngstown, Ohio, and in the form of circulars sent to citizens of said city, all of which was done at the instance of and under the direction and authority of the plaintiff in error.

Said article complained of is as follows:

"Mr. Nanson, a well known high-grade custom tailor of this city, and perhaps a personal friend of yours, suddenly decided to retire from the tailoring business. Desiring to turn his stock quickly into cash, asked us to name a price for the entire stock. The greater part of this stock being fall and winter goods, he naturally expected a good price, but finally accepted our offer."

## McKelvey Co. v. Nanson.

The plaintiff below complains of the words: "Mr. Nanson suddenly decided to retire from the tailoring business."

At the request of counsel for plaintiff below the court charged the jury that said words were libelous *per se*.

While the petition in error alleges other grounds of error, the only one urged by counsel in argument was that the court erred in charging the jury that said words were and are libelous *per se*, and therefore it is only necessary, for a proper determination of the case, to pass upon this one ground of alleged error.

Let us classify libels according to their objects:

1. Libels which impute to a person the commission of a crime.
2. That which has a tendency to hold a person up to scorn and ridicule, and to feelings of contempt, or impair one in the enjoyment of general society.
3. That which has a tendency to injure one in his office, trade, calling or profession.

The words complained of in the case at bar, if libelous, come under the third definition.

Is the expression here complained of libelous within itself?

A distinction exists between libel and slander. In libel the written or printed words are of necessity attended with more deliberation, and hence may be said to be indicative of stronger malice than oral words, and therefore calculated to do greater wrong and much more harm. In passing, we might add that written or printed words are libelous in all cases where, if spoken, they would be actionable; and they may be libelous, and at the same time, if spoken, would not be actionable. Our Supreme Court in the case of *Cleveland Leader v. Nethersole*, 84 Ohio St. 118 [95 N. E. Rep. 735; 23 Ann. Cas. 978], has laid down the rule as to what constitutes libel *per se*. The court say:

"To constitute a publication respecting a person libelous *per se*, it must appear that the publication reflects upon the character of such person by bringing him into riddicule, hatred

## Mahoning County Appeals.

or contempt, or affects him injuriously in his trade or profession."

To say of a person that he has suddenly gone out of business does not in any way reflect upon his character, or bring him into ridicule, or indicate hatred or contempt, or injury to his trade or profession, so far as the plain meaning and import of the words and language are concerned. If this be true, then how can they be libelous *per se*?

In order that words shall be libelous *per se*, as disparaging a person in his trade or business, they must be of such a character as would prejudice him by impeaching either his skill or knowledge or attacking his conduct in such business. The words in the publication complained of, in order to be libelous *per se*, must have had a tendency to render the defendant in error contemptible or ridiculous in public estimation, or to expose him to public hate or contempt, or hinder virtuous persons from associating with him, or accuse him of crime punishable by the laws of our state, or charge him with conduct the natural or ordinary result of which would be to prevent him from engaging and pursuing his vocation, trade or calling, or in some way depriving him of the earnings thereof, and which he otherwise would have obtained. Quoting from the case of *Cleveland Leader v. Nethersole*, *supra*, Judge Spear on page 130 says:

"Although the distinction between a libel upon a person and a libel upon that which is the property of a person, is somewhat nice, and although in many cases the distinction is not easy to demonstrate, it often being difficult to apply the settled rules of law to the particular facts of the case, and although the decisions illustrating the subject are not altogether consistent one with another, yet the rule seems to be well established to the effect that while by the law of libel defamatory language is actionable without special damage when it contains a damaging imputation against one as an individual, or in respect to his office, profession or trade, it is not actionable when it is merely in disparagement of one's property unless it occasions special damage."

We do not think the words complained of are libelous upon



**McKelvey Co. v. Nanson.**

their face; and we believe we are sustained in this conclusion by a long line of authorities not only in our own, but other states. To hold otherwise would be to set aside and hold for naught the decisions upon this subject which have been considered to be the law for many years.

Taking this view of the case, we find error in the record prejudicial to the rights of the plaintiff in error, and therefore find the judgment of the court below erroneous, and that it should be reversed.

The judgment of the common pleas court is therefore reversed, and the cause remanded for a new trial.

**Pollock and Metcalfe, JJ., concur.**

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**HIGHWAYS—RAILROADS.**

[Hamilton (1st) Court of Appeals, July 19, 1915.]

**Allread, Ferneding and Kunkle, JJ.**

(Sitting by designation.)

**CINCINNATI (CITY) v. CINCINNATI, L. & N. RY., ET AL.**

(Two Cases).

**1. Notice and Hearing not Required to Charge Railway with Cost of Construction of Highway Across Tracks.**

Section 3 of the act 97 O. L. 546, approved May 3, 1904, charging railroad companies with one-half the cost of constructing a highway across an existing railroad, is not rendered unconstitutional by the failure to provide for a notice and hearing in respect thereto.

**2. Liability for Construction of Highway Otherwise than Grade Holds against Both Principal and Operating Railroads.**

Where a railway over which it is sought to carry a highway otherwise than at grade has passed under the control of another company which has acquired its privileges and assumed its liabilities and duties, the one-half of the cost of obviating such grade crossing which the law imposes on the railway becomes a liability of both companies.

**ERROR.**

*Walter M. Schoenle and Carl M. Jacobs, Jr., city solicitors,*  
for plaintiff in error.

## Hamilton County Appeals.

*Lawrence Maxwell and J. S. Graydon*, for defendants in error.

**KUNKLE, J.**

The petition in case No. 5742 states in brief that plaintiff is a municipal corporation, organized under the laws of Ohio; that the council of said city has authorized the bringing of this suit; that defendants at all the times mentioned in the petition were and now are corporations, organized under the laws of Ohio for the purpose of owning, maintaining and operating railroads; that subsequent to the third day of May, 1904, the date of the passage of the act, "To provide how railroad and highway crossings may be constructed," the plaintiff built the highway known as Whittier street, across a certain railroad which had existed theretofore and is still in existence; that said railroad did at all times herein mentioned, and does now, belong to the defendant, the Cincinnati, Lebanon & Northern Ry. Co., that prior to the building of said highway, the defendants entered into a contract whereby the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., secured entire control of the privileges, tracks and property, and assumed all the debts, liabilities and duties of the defendant, the Cincinnati, Lebanon & Northern Ry. Co.; that under the existing conditions, and because of the topography of the highway, railroad and surroundings, it was impossible to construct the said highway below the grade of the said railroad, and the said highway was, therefore, constructed above the grade of the said railroad and was carried over the said railroad by means of a re-enforced concrete bridge or viaduct

The petition also contains an itemized statement showing that the total cost of the said bridge was \$6,438.50, and states that the said bridge was fully built and paid for in October of 1910, and that no part of the cost thereof has been paid plaintiff by defendants or either of them, although demand has been made therefor, and asks judgment against the defendants in the sum of \$3,219.25, with interest.

A demurrer was filed to the petition.

## Cincinnati v. Railway.

Error is prosecuted to this court from the judgment of the lower court sustaining such demurrer.

Plaintiff in error claims that the petition states a cause of action under Sec. 3 of the act approved May 3, 1904 (97 O. L. 546; Sec. 8895-8902 G. C.).

The title of said act is as follows:

"An act to provide how railroad and highway crossings may be constructed."

Sections 1 and 3 of said act reads as follows:

"Section 1. Except as in this act elsewhere provided, all crossings, hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof."

"Section 3. Every municipality or other authority hereafter constructing a highway across an existing railroad, shall construct the same above or below the grade thereof, unless permitted in the manner hereinafter provided, to construct the same at grade, and the cost of said work shall be paid, one-half by said municipality, and one-half by the railroad company owning said railroad."

Defendants in error in brief claim that the statute in question, if properly construed, requires a condemnation proceeding, or, if such proceeding is not required, then the statute is in contravention of the fourteenth amendment of the constitution of the United States, and of Art. I, Sec. 1, 16 and 19, of the constitution of Ohio.

We have carefully considered the very exhaustive briefs which have been filed by counsel in support of their respective contentions, but shall not attempt to discuss or review in detail the various authorities therein cited.

From a careful reading of this act we have reached the conclusion that the provisions of Sec. 4 apply only to a case where a grade crossing is sought to be established, and do not apply to crossings which are not constructed at grade.

We find no statute providing for notice and a hearing in respect to the construction of a crossing such as the one in question.

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This brings us to a consideration of the constitutionality of Sec. 3 of the act in question.

The authority of the Legislature to enact Sec. 3 under the police powers possessed by the state, is not seriously disputed by defendants in error, but they contend that the Legislature should have provided for a notice and hearing in respect to the improvement before the obligation provided in Section 3 can become effective.

The case of *Cincinnati, H. & D. Ry. v. Troy*, 68 Ohio St. 510 [67 N. E. Rep. 1051], is relied upon by counsel for defendants in error. We think this case is distinguishable from the case at bar. In the case there was no statute imposing liability.

The last sentence of the decision of the Supreme Court, in such cited case, is as follows:

"Since the legislative department of the state has not attempted to exercise the supposed police power in a case of this character, we have no occasion to consider whether it would be a proper subject of its exercise."

In the case at bar the obligation is expressly imposed by statute.

The question as to whether such a statute, in addition to imposing a liability, should also provide for notice and a hearing, has not been expressly determined by the Supreme Court of this state.

We find, upon an examination, that the decisions in other states are in conflict, but we think the weight of authority sustains the view that such notice and hearing are not required and that statutes imposing a liability such as that contained in sec. 3 of the act in question, are constitutional and valid.

We call attention particularly to the following authorities, wherein this question is discussed, namely:

In the case of *State v. Railway*, 98 Minn. 380 [108 N. W. Rep. 261; 28 L. R. A. (N. S.) 298; 128 Am. St. Rep. 581; 8 Ann. Cas. 1047], the first three paragraphs of the syllabus are as follows:

"The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways

## Cincinnati v. Railway.

laid out after the construction of the railroad, the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the traveling public.

"Such a requirement, being referable to the police power, is not a taking of private property for public use in violation of the constitution.

"A bridge over the railroad tracks, when necessary to make the crossing safe for public use, is a 'safety device,' within the meaning of that expression."

This decision is affirmed by the Supreme Court of the United States, in *St. Paul, M. & M. Ry. v. Minnesota*, 214 U. S. 497 [29 Sup. Ct. Rep. 698; 53 L. Ed. 1060].

See also case of *State v. Railway*, 98 Minn. 429 [108 N. W. Rep. 269], and which case was affirmed by the United States Supreme Court in *Northern Pac. Ry. v. Minnesota*, 208 U. S. 583 [28 Sup. Ct. Rep. 341; 52 L. Ed. 630].

In the case of *Missouri Pacific Ry. v. Omaha*, 235 U. S. 121 [35 Sup. Ct. Rep. 82; 59 L. Ed. 157], the first three paragraphs of the syllabus are as follows:

"A railway company may be required by the state, or by a municipality acting under the authority of the state, to construct overhead crossings or viaducts over its tracks at its own expense; the consequent expense is *damnum absque injuria* or compensated by the public benefit in which the company shares and is not a taking of property without due process of law.

"In the exercising of the police power, the means to be employed to promote the public safety are primarily in the judgment of the legislature, and the court will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished and does not arbitrarily interfere with private rights.

"If the state court has held that a municipality has power to pass ordinances requiring railway companies to build viaducts, this court can only declare such an ordinance unconstitutional under the fourteenth amendment as an arbitrary abuse of power in a clear and unmistakable case."

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In *Montana v. Richards*, 28 L. R. A. 298, there is also found an extended discussion of this question and a review of the authorities.

Counsel for defendants in error, in their brief, also claim that no cause of action is stated against the Pittsburgh, Cincinnati, Chicago & St. Louis Ry., for the reason that the petition alleges that the said railroad belongs to the Cincinnati, Lebanon & Northern Ry.

The petition does contain an averment as suggested by counsel for defendants in error, but it also contains an averment to the effect that the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. has, through contract, secured entire control of the privileges, tracks and property, and assumed all the debts, liabilities and duties of the defendant, the Cincinnati, Lebanon & Northern Ry.

Under the averments of the petition, we think both of the defendants in error are liable. We think such liability is determined by the decision of our Supreme Court in the case of *Baltimore & Ohio Ry. v. Walker*, 45 Ohio St. 577 [16 N. E. Rep. 475], the first two paragraphs of the syllabus of which case are as follows:

"A railroad company which has the possession and control of a railroad in this state, and is managing and operating the same, as the lessee thereof, is one 'owning the tracks' of such railroad, within the meaning of Sec. 3333 R. S., which provides that: 'When the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossings shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks.'

"The necessity for keeping the crossing in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads crossing each other at a common grade, and the benefits thereof accrue to the companies using and operating the roads; and, as such lessee company, while operating its road receives the benefit and security resulting from a safe crossing and the services of the watchman, it takes them subject to the burden of their expense, as provided by the statute."

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The necessity and reasonableness of the cost of the improvements in question are not now before the court, and we express no opinion as to whether the same can be questioned in this proceeding by way of defense.

It therefore follows that the judgment of the lower court should be reversed and the cause remanded, with instructions to overrule the demurrer, and for such further proceedings as may be authorized by law.

We do not have the papers in case No. 5743 before us, but it is agreed that the averments of the petition in that case are similar to those above quoted, except that the petition in the latter case asks for judgment in the sum of \$6,897.85, the one-half of \$13,795.71, the cost of the bridge referred to in that case, and the same judgment will be rendered in this case as in case No. 5742.

Judgments reversed.

Ferneding and Allread, JJ., concur.

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## INTOXICATING LIQUORS.

[Perry (5th) Court of Appeals, October Term, 1913.]

Powell, Voorhees and Shields, JJ.

### PETER DUNKLE v. JUNCTION CITY.

#### 1. Failure to Designate Place in Closing Hours Ordinances Precludes Conviction for Violation.

Conviction can not be had under an ordinance, intended to prohibit the keeping of any saloon open between the hours of 10 P. M. and 5 A. M., where there is no designation of place in the ordinance to which its provisions apply.

#### 2. Saloon Keeper Remaining in Saloon after Closing Hours to Compute Day's Receipts not Violation of Ordinance.

The purpose of such an ordinance must be held to be to prohibit a continuance of the business of the saloon between the hours named, and conviction can not be had of a saloon keeper, who closed his saloon before 10 P. M., but remained in the saloon with his bar keeper for twenty-five minutes after 10 for the purpose of counting the receipts of the day.

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## ERROR.

*T. B. Williams*, for plaintiff in error.

*J. W. Dugan*, for defendant in error.

## PER CURIAM.

On April 21, 1913, complaint in writing was made before the mayor of the incorporated village of Junction City, in said county, that the plaintiff in error on or about April 19, 1913, being then the keeper and owner of a saloon in said village and county, did unlawfully keep open and permit his saloon to be open between the hours of 10 o'clock P. M. and 5 o'clock A. M., for the period of twenty-five minutes after 10 o'clock P. M., to wit, until 10:25 P. M., contrary to the provisions of a certain ordinance of said village, the first section of which reads as follows:

"Section 1. That it shall be unlawful for any person being the owner, bartender, keeper, or having charge of any saloon, building, or other place wherein intoxicating liquors are sold at retail or exposed for sale at retail, to open, keep open between the hours of 10 o'clock P. M. and 5 o'clock A. M., provided that the provisions of this section shall not apply to the sale of intoxicating liquors by a regular druggist," etc.

Upon the foregoing complaint the plaintiff in error was arrested, tried and convicted of said alleged offense and sentenced by said mayor to pay a fine of \$35 and costs to all of which the plaintiff in error excepted. The case was taken to the common pleas court of said county on error, which said court affirmed the judgment of said mayor, and the case was brought into this court by a petition in error for review.

Said petition in error contains various assignments of error, but in our disposition of the case we will notice only such alleged errors as were urged upon our attention.

An examination of the ordinance on which this prosecution is based shows it to be somewhat vague and indefinite. While it provides that "it shall be unlawful for any person, being the owner, bartender, keeper or having in charge any saloon, building or other place wherein intoxicating liquors are sold at re-



## Dunkle v. Junction City.

tail or exposed for sale at retail, to open, keep open between the hours of 10 P. M. and 5 A. M.," there appears to be no designation of place—in the ordinance to which its provisions are applicable. Criminal statutes as against one charged with an offense are to be strictly construed. Speaking for the court Judge Williams in the case of *State v. Meyers*, 56 Ohio St. 340, 350 [47 N. E. Rep. 138], says:

"Under that fundamental rule of strict construction applicable to all penal laws, a statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons cannot be made subject to such statute by an implication. Only those transactions are included in them which are within both this spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused."

This rule of construction is alike applicable to both statutes and ordinances. But assuming that the language in the ordinance could be so construed as to harmonize with the evident intent and purpose of the ordinance, and that which was intended to be expressed therein is implied, how stands the case with reference to the other ground of error insisted upon by the plaintiff in error, namely, that there was a failure of proof upon the part of said village before the mayor to sustain a conviction of the plaintiff in error? It appears that the bill of exceptions is in the nature of an agreed statement of facts, which, among other things, contains the following: "That the defendant is a saloon keeper in said village; that on the night alleged in the affidavit the plaintiff, who is the owner and proprietor of said saloon, it does not appear that said saloon was saloon all persons immediately before 10 o'clock, and at 10 o'clock P. M. locked the doors of said saloon. That after locking said doors the defendant and bartender went to his cash register to count the receipts of the day and that he remained in said saloon, with his bartender, for about twenty-five minutes after 10 o'clock P. M., for the purpose aforesaid, before they

## Perry County Appeals.

came out of said saloon; and it is agreed that the ordinance attached is a true copy of the ordinance under which the defendant was arrested and which ordinance is to be considered as part of this bill of exceptions; that no other persons were in the saloon except the said defendant and bartender."

It is conceded that the plaintiff in error before 10 o'clock on the night in question "put out" all persons in his saloon, and at 10 o'clock locked the doors of his saloon, and that no person or persons were allowed to enter his saloon thereafter and before 5 o'clock the following morning. But it is claimed that after so closing his saloon the plaintiff in error and his bartender remained in his saloon "to count the receipts of the day," and so remained about twenty-five minutes "before they came out of said saloon," and that this act of the plaintiff in error was in violation of the provisions of said ordinance. While it appears that the plaintiff in error was the owner and proprietor of said saloon, it does not appear that said saloon was not connected with the building in which he resided, and if it was, and he went from his saloon into his residence, it would scarcely be claimed that going from his saloon into his residence would be such a "keeping open" as to fall within the purview of said ordinance. But the real charge here is that the plaintiff in error and his bartender remained in the saloon after 10 o'clock P. M., to count the cash, after the doors of the saloon were locked and kept locked. It does not appear whether there were or were not any lights in the room, the inference being however that there was at least one light. But whatever the number of lights, was the sole fact of the plaintiff in error and his bartender remaining in the saloon for the time and for the purpose indicated, after 10 o'clock P. M., an offense within the intent and meaning of said ordinance? Was it a keeping open of the saloon in contemplation of said ordinance? Or does the ordinance seek to punish those who would keep open the saloon after the hour named for the purpose of continuing their business? While the ordinance in effect amounts to a prohibition, it is in our judgment a prohibition intended to operate against carrying on the business after a stated hour.

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For the reasons stated, we think that the mayor erred in overruling the motion of the plaintiff below to dismiss said case, and the court of common pleas likewise erred in affirming the judgment of the mayor. The judgment of the mayor and that of the court of common pleas will therefore be reversed, and it is ordered that the plaintiff in error be discharged from further custody.

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**RAILWAYS.**

[Cuyahoga (8th) Circuit Court, December 24, 1913.]

Winch, Meals and Grant, JJ.

**\*CLEVELAND & PITTSBURGH RY. v. STATE OF OHIO.**

**Excise Tax Provisions not Applicable to Railway Companies Whose Lines are Being Operated Under Lease.**

A steam railroad corporation which has leased its entire line and equipment and is not operating within the state of Ohio, is not required to pay an assessment under the Willis law upon its issued and outstanding capital stock.

[Syllabus by the court.]

**ERROR.**

*Squire, Sanders & Dempsey, W. O. Henderson and Lawrence Maxwell*, for plaintiff in error.

*T. S. Hogan, C. D. Laylin and Robert M. Morgan*, for defendant in error.

**WINCH, J.**

This is an action to reverse a judgment for \$85,203.40 recovered by the state against the railroad company for delinquent excise taxes found to be due under the Willis law, so-called, for the years 1902 to 1908, inclusive, being an assessment amounting to one-tenth of 1 per cent upon the issued and outstanding capital stock of the railroad company for said years. The railroad company claims the judgment is not authorized by law.

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\*Motion to certify record overruled by the Supreme Court, March 24, 1914.

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There is no dispute as to the facts of the case, and though the literature of the case is voluminous, it will not be greatly extended by this opinion, for all that is really involved in the case is the true intent and meaning of a statute which seems plain enough upon its face for him who runs to read and understand.

Previous to 1871 the Cleveland & Pittsburgh Railroad Company was a steam railroad corporation duly incorporated under the laws of Ohio and owning and operating a railroad within the state. It was also incorporated under the laws of Pennsylvania and owned and operated a railroad in that state, connected with its Ohio line.

October 25, 1871, the Cleveland & Pittsburgh Railroad Company leased all its property to the Pennsylvania Railroad Company and surrendered possession of all its railroad and all property and equipment connected therewith to the Pennsylvania Railroad Company, the former company retaining its corporate existence, however, for the purpose of collecting its rent under the lease and distributing the same as dividends to its stockholders, with an agreement to pay for extensions, renewals, betterments and increased facilities for its railroad properties, the latter company to operate the road and pay all taxes lawfully assessed against it.

April 14, 1873, all rights under this lease were assigned to the Pennsylvania Company, which has ever since been in possession of the property, operating the same and paying all taxes assessed on the real and personal property of the lessor company.

April 11, 1902, the original Willis act (95 O. L. 124) was passed and Secs. 1, 2 and 7 thereof require consideration in this case, as well as Sec. 7 of the act as amended April 25, 1904 (97 O. L. 381).

These two acts cover the period for which taxes were claimed by the state; there have been amendments to these statutes passed since 1908.

By the first section of the act of 1902, every corporation organized under the laws of this state, for profit, is required to

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make a report in writing to the secretary of state, annually, setting forth certain facts, including the nature and kind of business in which the company is engaged and its place or places of business, and to pay a fee of one-tenth of 1 per cent upon the subscribed or issued and outstanding capital stock of the corporation.

By the second section of this act, every foreign corporation for profit doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to certain requirements of other laws, is required to make a report of certain facts to the secretary of state, annually, and to pay an annual fee, for the purpose of exercising its franchises in Ohio, of one-tenth of 1 per cent upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio.

Ever since the passage of this act the Pennsylvania Company has made reports to the auditor of state and has paid an excise tax upon the gross earnings from the operation of the Cleveland & Pittsburgh Railroad within the state of Ohio, as required by the second and fifth sections of the act of March 19, 1896 (92 O. L. 79), sometimes called the Cole act, and the amendments thereof. The Cleveland & Pittsburgh Railroad Company has never filed the annual reports nor paid the taxes required by either the Willis law or the Cole law, claiming that it was not required to do so, because it was not "engaged in business" within the intendment of said laws, and in the claim that it was not required to file annual reports with the auditor of state, the state has acquiesced and still acquiesces. With the merits of this claim we are not now concerned, as will develop from further consideration of the case, but an assumption that this claim is correct is necessary to an understanding of the state's contention regarding the meaning of Sec. 7 of the act of 1902, to which we now come.

The legislature having provided by other laws for the payment of excise taxes by certain corporations, Sec. 7 of the Willis act exempts them from the payment of a franchise tax or fee

## Cuyahoga County Circuit.

under its own provisions in the following language (quoting only so much as is applicable to this case):

"Provided that electric light, gas, natural gas, waterworks, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, \* \* \* shall not be subject to the provisions of the preceding sections of this act "

The amendment of 1904 (97 O. L. 381) makes no change in this language except to insert the words "public service," between the words "other" and "corporations" so as to read "other public service corporations" instead of "other corporations."

We apprehend this amendment is not important in a discussion of this case and confine our attention to a consideration of the meaning of the section as originally enacted.

The contention of the state, to quote from the brief of the attorney-general and his associate counsel is:

"That Sec. 7 does not except the plaintiff in error company because, though it is chartered as a railroad company corporation, it is not an operating company, and was not required during the years in question to file a report with the auditor of state and pay a tax under the Cole law, so-called; and that the mention of steam railroad in Sec. 7 means a steam railroad corporation which in addition to owning its property, is also the operator thereof."

It would seem that the legislature, if it had intended what the law officer of the state now contends for, would have said so. It could have said so by using the following simple language:

"Provided that all corporations (or all public service corporations) required by law to file annual reports with the auditor of state, shall not be subject to the provisions of the preceding sections of this act."

Instead of using this simple language it enumerated some fifteen kinds of corporations, and then said "and other corpor-

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ations, required by law to file annual reports with the auditor of state," shall not be required to comply with the act.

Clearly the intention was to exempt steam railroad corporations, and the other fourteen mentioned corporations, from the operation of the act, and also to exempt therefrom such other corporations, if any, then existing, or which might thereafter be authorized by law, and which might be required by law to file annual reports with the auditor of state.

The use of the words "other corporations required," etc., was to complete the enumeration of exempt corporations and not, as claimed by the state, to limit and qualify the enumeration already made.

At least two good reasons appear for this conclusion: there was then in existence at least one kind of corporation (equipment company) not enumerated, which was required to file annual reports with the auditor of state, and other like companies might afterwards be authorized by law in which event Sec. 7 of the Willis act, with its enumeration of exempt companies, but without the general words, "other companies," etc., would have to be amended every time such new companies might be authorized.

We think the legislature meant something by its enumeration of exempt companies in Sec. 7, and that the courts are not at liberty to disregard this enumeration and rewrite the statute as suggested by the attorney-general. That is for the legislature to do and it is significant that the legislature has not done it, though more than ten years have elapsed and subsequent legislation has wholly revamped the laws upon the subject here involved.

We conclude that the statute is unambiguous and plain, requiring nothing to be added to or taken from its words so that it may be understood and applied by the taxing officers of the state, and that by its plain terms the Cleveland & Pittsburgh Railroad Company, being a steam railroad corporation is exempt from the provisions of the Willis act.

This conclusion makes it unnecessary to examine other statutes claimed to be *in pari materia*, or to go beyond the words of

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Sec. 7 itself, to determine the intention of the legislature in enacting said section. The section intends what it says.

For the same reason it becomes unnecessary to consider the very interesting question submitted by the railroad company as to the effect of the judgment of the court below, which allowed the claims of the state, resulting, as clearly pointed out in briefs of counsel, in double taxation of one business, for the lessee company pays the Cole tax on the gross business done on this railroad and pays it for the lessor company.

The leasing of railroads by Ohio railroad corporations is favored by our statutes, but to make the giving of such a lease require the payment of additional taxes to the state, would penalize and prohibit such leasing.

For the reasons stated, because the plain words of the statute require it, the judgment is reversed, and there being no dispute as to the facts of the case, judgment is rendered for the plaintiff in error.

Meals and Grant, JJ. concur.

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APPEAL—INDUSTRIAL COMMISSION.

[Cuyahoga (8th) Court of Appeals, March 22, 1915.]

Meals, Grant and Carpenter, JJ.

## SAM POLICE V. INDUSTRIAL COMMISSION OF OHIO.

## 1. Right of Appeal Lies From Award of Industrial Commission.

An appeal by an injured employe lies from a decision by the industrial commission, where the award made for a permanent injury of a serious character is so small as to indicate that it was intended as a mere gratuity to one not injured in the course of his employment and therefore not entitled to anything.

## 2. Right of Appeal Distinguished in Application to Award of Industrial Commission and Court of Inferior Jurisdiction.

The right of appeal to the court of common pleas, granted by Sec. 1465-90 G. C. to an employe dissatisfied with an award of the state industrial commission, is a mode of removing a cause from an administrative to a judicial tribunal and independent of the right of appeal from an inferior to a superior court.



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*G. E. Romano and C. W. Toland*, for plaintiff in error.

*Cyrus Locher*, for defendant in error.

**GRANT, J.**

By the petition in this proceeding we are asked to reverse the judgment of the court of common pleas.

The error assigned is that that court refused to entertain the appeal of the plaintiff from the final action of the defendant, the Industrial Commission of Ohio, in this case, but dismissed the same as for want of jurisdiction of the subject thereof.

In his petition in that court the plaintiff alleged—as the fact is—that the defendant is the successor in law of the former State Liability Board of Awards of Ohio, charged with the duties of the latter, to full effect, as provided by statute; that at the time when the plaintiff came to his injuries alleged, the Union Rolling Mill Company, his employer, was a contributor to the fund controlled by and subject to the award of the defendant, in the discharge of the duties devolved by law upon the latter. That in the course of such employment and arising therefrom, while in that service, the plaintiff received certain bodily hurts in the form of a double hernia, to his great and permanent injury. That the plaintiff thereupon elected to pursue the remedy for his wrong in the mode provided by the statute creating the defendant and prescribing its duties and jurisdiction, and made his application to that end, in due form and as provided by the law in question. That the defendant took jurisdiction in the matter and upon a hearing had, found and awarded to the plaintiff in the sum of \$10.50 and no more, in full satisfaction of his right to compensation at its hands for his injuries had and received. That the award was in sum so grossly disproportionate to the just claim to which the plaintiff was entitled as—the circumstances considered—to amount to a total denial of his right to participate in the fund to which his employer was a contributor and to administer which in accordance with the facts the defendant was charged, as an official

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duty, and that—the circumstances still considered—the award, in that amount, must be regarded as having been made either under some mistake or was moved by passion or prejudice; in any event, that it was contrary to the evidence and the law, and that the application was heard without the plaintiff being notified and out of his presence, so that he had no day in court or due process of law. The prayer of the petition was for an award in satisfaction of the injuries sustained by the plaintiff.

The defendant board answered, the substantive part of its defense being that it considered the plaintiff's claim, as it was in duty bound to do, and allowed to him only the sum named in the petition. The answer alleged that under the law this action of the board was final and conclusive as to the plaintiff's right to participate in the fund to which his employer had contributed and that he was, under the law, without further remedy.

A trial was had to the court without a jury, at which the plaintiff gave testimony tending to prove the truth of the material allegations of his petition, which were not conclusions only, and that his injuries, from whatever cause arising, were serious and permanent. He also offered evidence to prove certain allegations of conclusion in his petition, but this was rejected.

At this point the court below, of its own motion, raised the question of want of jurisdiction. After argument had the petition was dismissed on that sole ground.

A motion for a new trial was made and denied, and a judgment in favor of the defendant for costs was thereupon entered.

This action of the court below is assigned as error.

The single question to be determined here is that of jurisdiction. Did the court of common pleas have it?

Within the landmarks of the law being administered, it is the part of a good judge to enlarge his jurisdiction. So anciently said the maxim, which, we take it, means that the law is to be declared in the spirit of its creation, so that the declaration does no violence to its manifest expression in words. Applied to the statute which the defendant board is required to administer in its integrity, the principle is that the purpose of the law is to

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be made good and effectual. That purpose is in no way obscure or past finding out. And where the purpose is not observed by those entrusted with that service, or is plainly disregarded by employing its letter to defeat its end, the correlative duty of the courts is conceived to be to exert whatever power may reside in them to correct the evil and advance the appropriate remedy.

We are inclined to think that much of the discussion as to whether this case in its progress from the commission to the common pleas court was an appeal in strictness of words or not, has been too technical and grudging in scope to promote the ends of the law. The word appeal has different meanings in different jurisdictions, and varies widely in application to various sets of circumstances. Of course, the appeal here was not an appeal in the sense that it brought the case up from an inferior to a superior court or judicial body; the defendant's functions are administrative. Constitutionally, they can not be assimilated to those of a court. This point has been settled, specifically, in *State v. Creamer*, 85 Ohio St. 349 [97 N. E. Rep. 602; 39 L. R. A. (N. S.) 694], where the predecessor of the present law in question was under review.

What really is meant by the word appeal, as applied to the right of the plaintiff to come into the court below, is a mode of removing his cause from an administrative to a judicial tribunal—he having, as he says, been denied his legal right by the action or nonaction of the former. In a popular and perhaps inaccurate sense of the term, this method of passing his grievance on to a court from a board may be called an appeal, and in this sense we think the word is used when the statute authorizes the removal. Considering the just and beneficent end sought by the entire enactment, it should not be defeated in any case by applying a mere verbal rule of strictness destructive of its plain intentment. “The letter (of the law) killeth, but the spirit giveth life.”

We now come to a consideration of the statute which, if any does, confers the right of appeal in the sense we have found, in this case. It is 103 O. L. p. 88, Sec. 43, and is as follows:

“The board shall have full power and authority to hear

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and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant, within thirty days after the notice of the final action of such board, may \* \* \* be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it.

We are next to consider what the plaintiff applied for when he came to the defendant board invoking its action. He says:

"I hereby make application to the Industrial Commission of Ohio for the payment of money out of the state insurance fund for compensation for injuries sustained by me on the eighth of April, 1913. \* \* \*

"(B) My injury consisted of double rupture.

"(D) My injury was not purposely self-inflicted."

Coming finally to the record of the hearing had of this application by the defendant board, it does not appear that the plaintiff was present. He says in his petition that he was not present and that he had no notice of it. And this is not controverted by the answer or otherwise. The finding of fact made at the hearing was in the following language:

\* \* \* "That applicant's injury consisted of a hernia, not resulting from an injury received in course of his employment. \* \* \* That said injury was not purposely inflicted. \* \* \* That proof on file is such as to show an aggravation of said hernia, for which an award is allowed as above."

The award thus referred to states the injury before the board for action, as follows: "Injury; double inguinal hernia." And the award proper is in these words:

"For medical services—\$3. (Dr. O. E. Biddinger, 756 Run Bldg., Cleveland, O.)

"For truss—\$3.50. (Applicant.)

"For compensation—\$7."

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The seven-dollar item is stated to be "two-thirds weekly wage."

This finding, upon which the action of the board denominated an award is founded, affirmatively brings the case within the second exception of the statute which we have quoted—namely: that the injury passed upon "did not arise in the course of employment." So that, if all compensation was refused, the right of appeal would be established, and the plaintiff would have his day in court on that footing and "be entitled," as the statute says, "to a trial in the ordinary way."

An avoidance of this effect is sought, and apparently it was so intended by the finding, in the fact that an award of seven dollars was made as ostensible compensation for what is said to be an aggravation of the hernia, for causing which alone compensation was asked.

The application made by the plaintiff is in the record in full and it is in no respect doubtful or ambiguous. Specifically and without an alternative asking, it calls for compensation for a double rupture arising in the course of the plaintiff's employment. Just as specifically, the finding is that the injury did not so arise.

The plaintiff did not apply for any relief upon the ground that his injury was a pre-existing injury which had been "aggravated" in the course of his employment, and the finding does not say that the aggravation so arose. The award was for a thing not asked for and was in the nature of a voluntary act on the part of the commission. Whether it was regarded as a charity or donation or something akin to that in nature or intent, does not clearly appear, but that it could have been considered as in any reasonable or just sense a thing of compensation, seems to be negatived by the measure of relief purported to be advanced by the award itself as to its amount. The injury, if there was one, occurred on April 8, 1913. The application was sworn to on October 10, 1913. It was heard, and the alleged award was made October 24.

And yet the allowance was as for two-thirds of the man's wages for one week. That an aggravation of a double hernia

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should cease abruptly at the end of a week is hardly supposable. Yet the award made necessarily supposes that, if the award was made on the footing of compensation alone, which is the only basis the statute allows. And the aggravation found was found, apparently, as existing at the date of the finding, which was more than six months after the time of the injury. The language is in the present tense.

In that case the disproportion between the compensation due and that awarded reaches the vicinity of the grotesque. It is certain, to our apprehension, that the award was for something clearly that the plaintiff had not asked and did not want, and that it was not made upon his application, but by the mere fiat of the defendant board. If that was done as an act of supposed charity, or was bestowed as an unearned bounty, it was an unauthorized act and beyond the power of the board to do it.

The application was for compensation for an injury arising in the course of his employment. By its finding that the injury did not so arise, the board, for that injury, awarded him nothing. Under the law, so finding, it could not have awarded him anything. To have done so would have been a plain contradiction in terms and a palpable misuse of the public funds entrusted to the board for distribution only to those entitled. If the disposition of the seven dollars and the price of a truss and the payment of a doctor's bill was a supposed donation or a charity proceeding on equitable grounds, it was equally a malversation of a public trust, a volunteer service to an individual, not warranted by law. In terms of his application, the plaintiff got nothing by the award. Whatever that award was it was not compensation. Compensation is the plaintiff's right, if right he had. It would be grossly unjust to him to deprive him of his right and substitute a supposed charity in its place. It is the infirmity of far too many public agencies today to deny rights and ask men to make mendicants of themselves instead. They mistake the temper of our people altogether. We are not yet ready to be made Neapolitans of, as that nation of beggars was a century ago. Right and charity are enemies and not allies.

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Shall this saving performance of throwing a sop of two-thirds of a week's wage and a truss to one however deserving, be allowed to operate as a defeat of the right the plaintiff would otherwise have to bring his case to court and wage his law there? To say yes would be doing violence to the spirit and intentment of the act which alone confers power upon the defendant board. And it would contradict its letter. As to what alone he asked, the plaintiff took nothing under the finding. Again stated, that finding was that he did not come to his injury in the course of his employment, and also again stated, this brings his contention within the second named exception to the finality of the board's action, as enumerated in the statute. And, having regard to the effect now claimed for the seven dollars and a truss allowance, namely, to defeat all right of appeal to the courts, we may not be surprised that the plaintiff reasonably fears the bounty of the "gift-bearing Greeks."

Having thus fixed the ultimate quality of the award purported to have been made, and having a proper regard to, and sense of, the operative effect expected by the defendant to be given to it, we may without impropriety, as we think, appeal to the legislative intent to be found in the act itself, through which alone the board has its being and brings its activities to bear. A part of this is as follows:

"Such board shall not be bound by the usual common law or statutory rules of evidence, or by any technical rules of procedure, other than as herein provided; but shall make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

We can not bring ourselves to think that this wholesome immunity from the shackles of common law rules is in any plain case to be used as a club to knock the real purpose of the act into insensibility, or as a sponge, saturated with chloroform to bring about a like condition. We do not believe that this salutary admonition to do justice, though the heaven of red-tape shall fall, can be prostituted into a letter of marque to prey upon the rights of a really meritorious claimant of its benefits.

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Our opinion is that this provision rests under no such scandalous reproach as that, but that it is provident of the rights of the injured as well as those who for a little while may happen to make up an administrative board. And applying it in that view, although we confess we do not see the need of it, since the board clearly denied the plaintiff the relief, and all the relief he asked, but in shaping our course upon the latitude of this beneficent and good sense provision of the act, we say, and how stands the case? "Ask and ye shall receive," is the scriptural exhortation. The plaintiff asked, but did not receive—not what he asked, but something quite different—different both in origin and as to measure. Because he was denied, shall a court deny him a hearing which the law says he shall have in case he does not receive what he asks, although he may be allowed something that he did not ask? Another injunction of Scripture is eminently suggestive of what out fit answer should be—"knock, and it shall be opened unto you." The plaintiff is knocking and the admonition is to open, *i. e.*, the way into court.

"Ye who turn judgment to wormwood," is the denunciation of the prophet of old. And the acute and excellent Bacon adds, "And surely there be also that turn it into vinegar."

We are, therefore, not without forewarning of what we think we are expected to do by joining in a judgment the effect of which will be to turn a claimant out of the only court that can be open to him, without any real meaning of the word.

That the award of seven dollars and a truss was engendered from a purposeful design to "beat the law" is not to be thought of by any man with charity enough in him to be self-respectful. If that were to be imputed to any as certainty, the poverty of the English language would be too great to fitly characterize it. The idea could not be tolerated except upon the impossible supposition that appointive boards consider themselves irresponsible, not only at the bar of the law, but to that healthy corrective even of law itself—the power of an informed, conservative and conscientious public opinion, exerting itself through law-serving agencies, and reaching the uttermost nerve and limb of the body politic. to the healing of all their disorders. We are glad, for the defendant, to repel and resent the imputation.



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But we do not find as a fact that the defendant body "denied the right of the claimant to participate at all in (the) such funds, on the ground, \* \* \* 2. That the accident did not arise in the course of employment," and that an award of something of which he was at no time or in any manner a claimant, ought not to, and can not, defeat his right to appeal, dependent only upon the denial of the claim made.

Another conclusion would, in our opinion, do manifest violence to the spirit of the act in question, be destructive of its letter and very damaging to its effect as an expression of the mature and just policy of Ohio in its relation to a matter of grave and important public concern.

We should in any case be very loth to so declare a law passed for his benefit, as that a meritorious suitor should have it to say:

"And be these juggling fiends no more believ'd  
That palter with us in a double sense;  
That keep the word of promise to our ear  
And break it to our hope."

So finding, it follows that the court of common pleas should have entertained the plaintiff's appeal in this cause and taken jurisdiction to hear and determine the matter of his petition, as directed by law.

It was error not to do so, for which the judgment complained of is reversed, and the cause is remanded to the court from whence it came here, for such further proceedings as may be in accordance with law.

**Meals and Carpenter, JJ., concur.**

## Summit County Appeals.

**COVENANTS—EASEMENT.**

[Summit (8th) Court of Appeals, April Term, 1912.]

Pollock, Metcalfe and Norris, JJ.

(Judges of the 7th court of appeals sitting by designation.)

LEO KUNKLE V. MATILDA BECK, ET AL.

**1. Right of Way of Sole Benefit to Grantee Breach of Covenant against Incumbrances.**

There is no difference between incumbrances which affect the title and those which affect the physical condition of the land, and where a right of way has been granted, which exists solely for the benefit of a private person or corporation, it constitutes a breach of covenant against incumbrances.

**2. Pipe Line Held Private Enterprise and Distinguished from Roads and Highways.**

A pipe line is a private enterprise, notwithstanding the public are interested in procuring the product which it transports, and such a line does not stand in the same category as roads and highways.

**METCALFE, J.**

Plaintiff here was plaintiff below, and this cause comes before us on demurrer to the defendant's answer. The petition alleges, in substance, that the plaintiff purchased from the defendants, and the defendants conveyed to him by warranty deed a certain farm. That the deed contained the usual covenants of title and against incumbrances. That prior to the execution of said deed to plaintiff defendants had granted and conveyed to the East Ohio Gas Company a right of way across said farm, by which a perpetual right was granted to that company to maintain and operate a gas pipe line thereon for the transportation of gas, and that said line had been laid down and has ever since been maintained and operated by the company. Plaintiff claims that said right of way constitutes an incumbrance on said farm which lessens its value and thereby causes him damage.

Defendants in their answer admit the execution of the instrument conveying to the gas company the right of way in question and that the company has laid and maintained a pipe line across said right of way. For a second defense the defend-

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ants say that before the execution of the plaintiff's deed, and while the plaintiff and defendants were negotiating about the sale of the farm they informed the plaintiff that they had conveyed such right of way to the said gas company, and that the plaintiff had knowledge of the fact that a pipe line had been laid across said land. That the physical evidence of the fact was visible to the plaintiff, and that while said negotiations were in progress plaintiff inquired of them what consideration they had received for conveying said right of way, and when informed of the amount asked to have the same deducted from the purchase price of the farm, which was agreed to by defendants, and the sale consummated in accordance with such agreement. In a third defense the defendants aver that such right of way is not an incumbrance in any way affecting the title to the property, but is merely an easement affecting its physical condition, and that the plaintiff having knowledge thereof is estopped from claiming the same to be an incumbrance.

Plaintiff demurred to the answer and the common pleas court overruled the demurrer, and the plaintiff not pleading further judgment was entered against him on the pleadings. Error is prosecuted in this court and the only question is whether the common pleas court erred in so holding.

In our judgment the common pleas court erred in overruling the demurrer. The matter set forth in the second defense is a parol arrangement between the parties made before the execution of the deed, which is clearly in contravention of the terms of the deed itself. While this matter, if properly pleaded, might constitute a good cause of action to reform the deed, it is no defense in an action on the covenant against the incumbrances, and parol evidence would not be admissible to prove such an understanding. *Long v. Moler*, 5 Ohio St. 271.

As to the matter set forth in the third defense, a question much more difficult of solution is presented. It is urged with much ability that the incumbrance, being open, notorious and visible is not such an incumbrance as affects the title, but only affects the physical condition of the land, and that the plaintiff having knowledge of its existence at the time of the purchase of

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the farm can not now be heard to complain that it is a damage to him. Many authorities are cited upon this proposition, and there seems to be respectable holdings that where the right of way is a public highway, or a railroad which was known to the parties at the time of the conveyance that its existence furnishes no basis for an action for breach of the covenant against incumbrances. *Kutz v. McCune*, 22 Wis. 628 [99 Am. Dec. 85]; *Memmert v. McKeen*, 112 Pa. St. 315 [4 Atl. Rep. 542; 30 L. R. A. (N. S.) 833].

But where the right of way is a private one existing solely for the benefit of a private person or corporation, we think the decided weight of authority is to the effect that such incumbrance constitutes a breach of the covenant.

In *Long v. Moler*, *supra*, above cited, it is held that incumbrances known to the parties at the time of the conveyance are not presumed to be excluded from the operation of the covenant.

The correct rule, as we think, is clearly stated in *Huyck v. Andrews*, 113 N. Y. 81 [20 N. E. Rep. 581; 3 L. R. A. 789; 10 Am. St. Rep. 432]. In this case it was held that the right to maintain a mill dam constituted a breach of a covenant against incumbrances, though the easement was perfectly visible to the grantee, and was known by him at the time he purchased the premises.

"There is no distinction in this respect between incumbrances which affect the title, and those simply affecting the physical condition of the land."

In this case the cases of *Kutz v. McCune*, 22 Wis. 628, and *Memmert v. McKeen*, *supra*, both of which are cited and much relied upon by counsel for the defendant in error, are disapproved. On page 90 it is said respecting these cases:

"They open to litigation upon parol evidence in every action for the breach of the covenant against incumbrances, caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right,

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interest or dominion over the land, and that he may rely upon them for his security. If open, visible and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them."

And our own Supreme Court in *Long v. Moler, supra*, seem to be of the same opinion. On page 274 it is said:

"The covenant embraces in terms all incumbrances whatsoever and expects none whatsoever. \* \* \* The parties may have had an understanding resting in parol to the effect that the taxes of the current year were to be excepted from the operation of this covenant. But this we can not know; for parol evidence is inadmissible to contradict or vary the plain provisions of the deed. The application of the rule may possibly, in this case, work injustice to the defendant. If so, we can only regret it; for the rule itself, being a salutary one, must be maintained."

The following cases also, we think, support the view we have taken in this case: *Ladd v. Noyes*, 137 Mass. 151; *McGowen v. Myers*, 60 Iowa. 256 [14 N. W. Rep. 788]; *Teague v. Whaley*, 20 Ind. App. 26 [50 N. E. Rep. 41]; *Myers v. Munson*, 65 Iowa 423 [21 N. W. Rep. 759].

We are satisfied that the rule contended for that open, notorious and visible incumbrances are excepted from the operation of covenants against incumbrances finds no support in the Ohio decisions. It is urged that the right of way granted to the gas company is in the nature of a public easement, but we are unable to accept this view. Whatever the rule may be with regard to highways, we do not think that this pipe line can be regarded in the same category with roads and highways. Its construction was a private enterprise, and the fact that the public are interested in procuring the product which it transports does not make it any the less so.

Judgment of the common pleas court is reversed and the cause remanded with instructions to sustain the demurrer.

**Pollock and Norris, JJ., concur.**

## Franklin County Circuit.

## APPEAL—ERROR.

[Franklin (2nd) Circuit Court, July 30, 1912.]

Dustin, Allread and Ferneding, JJ.

CHARLES C. HIGGINS V. TURNEY &amp; JONES, CO., ET AL.

1. Dismissal on Appeal and Affirmance on Error to Judgment on Demurrer to the Facts not Ground for Extension of Time for New Action.

Dismissal on appeal and affirmance on error in the court of appeals of an action that failed in the common pleas upon the merits—demurrer to the facts—does not work an extension of a years time within which to institute a new action under Sec. 11233 G. C.

## DUSTIN, J.

The point suggested by counsel for plaintiff in error that his action is within time under Sec. 11233 G. C., because brought within a year after a dismissal "otherwise than upon its merits" by the circuit court, on appeal, is not, in our view, well taken.

The case of *Cummings v. Dougherty*, 1 Dec. 231 (31 Bull. 140), does not, we think, state the law.

If a plaintiff wins in the trial court but the judgment is reversed in the upper court, he has a year after reversal in which to bring a new action; or, if he fails in the trial court otherwise than upon the merits, he has the same right.

In the case at bar Jones failed in the trial court upon the merits, viz., upon a demurrer to the facts. By taking an appeal he took the chances of losing by limitation of time. The dismissal of the appeal and the affirmance on error did not, we think work an extension.

Judgment affirmed.

Allread and Ferneding, JJ., concur.

Bank v. McDonald.

## BANKS AND BANKING—FRAUDULENT REPRESENTATIONS.

[Hamilton (1st) Court of Appeals, December 15, 1913.]

Swing, Jones and Jones, JJ.

SECOND NAT. BANK V. GEORGE E. McDONALD.

**1. Mere Exaggeration of Dividends of Stock not Fraudulent Representation if Truth Easily Ascertainable.**

A defense of fraudulent representation will not lie to an action by a bank for recovery on a note, executed for a certificate of a new issue of stock, the representations consisting of statements by the cashier that the bank had a large surplus and was paying 12 per cent dividends, which was a fact; that the dividends would pay the interest on the note which, though not true, was easily ascertained by a simple mathematical calculation; and that the dividends probably would be increased which did not happen.

**2. Inadequate Defenses to Note for Bank Stock Sued on.**

A defense to an action by a bank on a note, given for a certificate of new stock issued, that such increase of stock was invalid does not lie, it appearing that it was duly authorized by the comptroller of the currency, or that the transaction was ultra vires, because the note was a mere loan to the bank for which it accepted its own stock as collateral, or that there was no consideration for the loan because the stock was not delivered but was held as collateral, possession being obtainable at any time by paying the note.

ERROR.

*Jelke, Clark & Forchheimer* and *Peck, Shaffer & Peck*, for plaintiff in error.

*Hackett, Yeatman & Harris*, for defendant in error.

JONES, O. B., J.

This was an action on a promissory note for \$2,750 given by defendant to plaintiff dated February 1, 1912, payable on demand. This note was given in renewal of a note for the same amount dated January 16, 1909.

The plaintiff, a national bank whose capital stock was \$500,000, by virtue of the federal statutes took the necessary steps to increase its capital to \$1,000,000. The defendant be-

## Hamilton County Appeals.

came a subscriber for ten shares of its capital stock, purchased by him at the market price of \$275 per share. The bank loaned him \$2,750 to pay for this stock, and took the original promissory note as evidence of that loan, crediting \$2,750 as cash paid in on account of its capital stock. A certificate for ten shares of stock was made out in the name of G. E. McDonald, and instead of his endorsing a transfer in blank on this certificate, an irrevocable power of attorney was executed by him appointing the Second National Bank as his attorney, to sell, assign, transfer and set over all or any part of said stock. This stock, with such power of attorney, was held as security for said loan.

Defendant paid twelve quarterly installments of interest on said note, at 5 per cent which were credited on the back of the note, the first installment being credited February 1, 1909, and the last one on the original note November 1, 1911. There is also a credit on the note sued upon of \$47.80, paid August 23, 1912. McDonald received dividends on this stock as declared by the bank.

The petition is the usual form on a note. Defendant filed an answer and cross petition in which, in addition to a general denial, he pleaded that he had by the fraud of the bank been induced to subscribe for shares of its capital stock, which was then paying a dividend of 12 per cent, and on the promise that it would take his note payable on demand with 6 per cent interest, that it would not call such loan but would hold the certificate of stock as payment for the said note, and that the dividends on said stock would more than pay the interest on said note and in addition would pay part of the principal, so that eventually said stock so subscribed would become his property without having to pay out any money for it.

Defendant alleges that said statements were not true, and that he never received the stock and the note was therefore without consideration; and he further pleads that the act of receiving said note in payment for stock subscription was *ultra vires* on the part of the bank. And by way of cross petition defendant asks for a judgment against the bank for twelve



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quarterly payments of interest upon said note, of \$41.25 each, amounting to \$495.

The allegations of this answer were denied by a reply.

At the close of the evidence the court below refused plaintiff's motion for an instructed verdict in its favor, but granted the motion of the defendant for an instructed verdict in his favor without finding any money due to him.

The evidence shows that Mr. McDonald, who was a building contractor, had erected the new bank building for plaintiff in which it was doing business, and was acquainted with its officers. When its capital stock was about to be increased Mr. Williams, its cashier, suggested to him the idea of taking some of its stock. Mr. Williams stated to Mr. McDonald, when he made the subscription, that the bank was in a prosperous financial condition and had a surplus of \$500,000, which was true, and that the bank was declaring dividends of 12 per cent per annum, which was also true, and further stated that these dividends would about pay the interest on the necessary loan to buy the stock. While the answer alleges that the interest on the note was to be 6 per cent it seems that the interest charged by the bank was 5 per cent which amounted to \$137.50 per year, while the dividend at 12 per cent was \$120 on ten shares. These facts McDonald knew at the time of the subscription so he was not misled into believing that the rate of dividend then being paid would quite carry the interest on the note. The opinion of both Mr. Williams and of Mr. McDonald at that time was that the stock would appreciate in value and the dividends would probably be increased, but there is no testimony showing that any representations were made as to how much this increase might be or when it might be had. The cashier testified that he himself had at the same time bought stock of the bank and then believed it a good investment. There is no evidence in the record that the bank changed its prosperous condition during the time that this note and stock were carried, and in fact we fail to find any evidence that the bank ever did become in a failing or insolvent condition.

Representations made by the cashier to McDonald at the

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time he subscribed for his stock, so far as past and present conditions were concerned, were true. Any statements made by him as to future prospects or hopes relating to the bank were merely his opinion, and appear to have been honestly made, and could not be held fraudulent with the effect of relieving the defendant from his obligation. *Armstrong v. Karshner*, 47 Ohio St. 276 [24 N. E. Rep. 897].

As stated above, McDonald knew that the dividend at the current rate would not quite pay the interest, and there would have to be a material increase in the rate of dividend to have it not only carry the interest but allow payments on the principal of his debt to the bank.

Defendants argue that the increase of capital stock by the bank was illegal and therefore invalid, because a promissory note had been taken in payment of the stock when cash was required under Sec. 5142 R. S. of United States. This issue of capital stock was authorized by the comptroller of currency. His action is conclusive and its legality can not be questioned by defendant. *Latimer v. Bard*, 76 Fed. Rep. 536.

It is argued by defendant that this was virtually a loan made by the bank, taking its own stock as collateral, and that such a loan being forbidden by law was *ultra vires* and therefore can not be collected back by the bank. Such a defense by one who has given a note and secured a loan for it will not be allowed. *National Bank of Xenia v. Stewart*, 107 U. S. 676 [2 Sup. Ct. Rep. 778; 27 L. Ed. 592].

It is also argued that defendant received no consideration for the loan, as the stock was never in his hands. This defense can not be allowed, as the stock was actually issued. It was paid for by the money loaned on defendant's note. As a stockholder he received dividends upon the stock and paid interest on the note at least for two years, and at any time he had seen fit to do so he could have paid his note and secured possession of the stock certificate.

It is argued that there is no individual account with McDonald shown in the books of the bank; that one should have been opened in which he should have been credited with the

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money loaned and debited for the amount paid for the stock, the entries offsetting each other and thus closing his account, these in addition to the entry in the capital stock account showing the receipt of cash in payment for the stock sold. This is a matter of bookkeeping at best, but it does not seem to us necessary to open any account with McDonald and have cross entries therein balancing each other. From the evidence, it was evidently treated as a cash loan to him, just as though the cash had been counted out to him when his note was taken, and then counted back by him to pay for the stock. The entry crediting capital stock, given in evidence, seems to be all that was necessary in this transaction, in addition to the entries in bills receivable accounts.

As there is no valid defense to the note shown by the evidence, the court below was in error in instructing a verdict for the defense and refusing to grant plaintiff's motion for an instructed verdict in its favor.

The judgment below is reversed, and judgment will be entered here for plaintiff.

Swing and Jones, E. H., JJ., concur.

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**CRIMINAL LAW—PRISONS AND REFORMATORIES.**

[Richland (5th) Court of Appeals, September 11, 1914.]

Powell, Voorhees and Shields, JJ.

**J. A. LEONARD v. BARNETT LICKER.**

1. **Act Relating To Delinquent Children Reformatory In Character and not Unconstitutional.**

The provisions of the General Code relating to delinquent children are reformatory in their nature and not penal; hence the provisions of Sec. 1652 G. C., that "where it appears upon the hearing that such delinquent child is 16 years of age, or over, and has committed a felony" he may be committed to the Ohio State Reformatory, is not unconstitutional.

**2. Commitment of Delinquent Child to Reformatory Discretionary.**

Section 1681 G. C., is discretionary and not mandatory, and a delinquent child, charged with a felony, may be committed as provided in Sec. 1652, or recognized to the court of common pleas, subject to the requirements of the general criminal laws of the state, at the discretion of the juvenile judge.

**ERROR.**

*Clarence D. Laylin*, for plaintiff in error.

*Ezra Brudno*, for defendant in error.

**POWELL, J.**

The petition in error recites that the court of common pleas for this county, in a proceeding pending therein upon an application by the defendant in error, Barnett Licker, for a writ of habeas corpus on the plaintiff in error, J. A. Leonard, as superintendent of the Ohio State Reformatory, inquiring into the cause of the imprisonment and detention by plaintiff in error of one Samuel Licker, rendered judgment and made final order discharging said Samuel Licker from the custody of the plaintiff in error, and remanding him to the custody of the juvenile court of the county of Cuyahoga, that being the county from which the said Samuel Licker had been committed to the Ohio State Reformatory. The errors complained of are:

First. That the court of common pleas erred in discharging said Samuel Licker from custody.

Second. That the judgment of said court is contrary to the law of the land.

Third. That the final order made by the said court of common pleas affects the substantial rights of the plaintiff in error as superintendent of said reformatory, in that it interferes with the plaintiff in error in the discharge of the duties imposed upon him by law and by the order of the juvenile court within and for said Cuyahoga county, as set forth in the return filed by him in said proceedings and herein referred to.

A hearing was had upon the petition in error in which two principal contentions were urged:

First. That the statute under which the said Samuel Licker was committed to the Ohio State Reformatory was un-

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constitutional, in that no provision is made therein for indictment by the grand jury and trial to a jury as provided by law.

Second. That the statute itself does not authorize the commitment of juvenile delinquents between the ages of 16 and 17 years to the said Ohio State Reformatory.

Upon examination of the statutes the court has arrived at the conclusions following:

First. That the statute authorizing such commitment is not unconstitutional.

Second. That the said Ohio State Reformatory is not exclusively a place for the punishment of criminals.

Third. That the proceedings under the acts relating to juvenile delinquents are not criminal in their nature, but are intended to be and are reformatory.

Fourth. That the objects of the Ohio State Reformatory, in addition to being a place of detention for criminals, and therefore a prison as to such persons, are reformatory as to any other class of persons than criminals that may be authorized by law to be committed thereto.

Fifth. That the said Samuel Licker was ordered to be confined in the Ohio State Reformatory by the juvenile court of Cuyahoga county, Ohio; that he was between 16 and 17 years of age; that he was found by said court to be a delinquent, and that he had committed an act that would constitute a felony when committed by a person of full age, namely that he was guilty of grand larceny.

By the terms of Sec. 1652 G. C., a juvenile delinquent, "where it appears upon the hearing that such delinquent child is 16 years of age or over, and has committed a felony," may be committed to the Ohio State Reformatory.

Section 1681 provides that:

"When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, \* \* \* for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by

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law for the indictment, trial, judgment and sentence of any other person charged with a felony."

This statute is not mandatory in its character, requiring the court to order such child to be sent to the court of common pleas to be there dealt with as provided by law for persons charged with crime. It is merely permissive, and its provisions are not confined to delinquent children between the ages of 16 and 17 years, but apply to any and all delinquent children who may be charged with a felony, without reference to the age of such delinquent.

This statute is not in conflict with the provisions of Sec. 1652. Section 1652 provides a different place for the confinement of delinquent children over 16 years of age from the places of confinement to which all other delinquent children may be committed, namely, to the Ohio State Reformatory. Section 1681 provides that delinquent children of any age charged with a felony may be indicted and subjected to the provisions of the general criminal statutes and punished as may be provided therein.

The said Samuel Licker was committed to the Ohio State Reformatory under the provisions of Sec. 1652, the court in that case exercising its discretion as to the place of commitment. A large discretion is given to the juvenile court in the handling of delinquent children. Thus must necessarily be so because of the great variety of circumstances in which such delinquency appears.

It has been held by the Supreme Court of the state of Ohio with reference to the constitutionality of certain sections providing for the commitment of children now known in the statutes as delinquent children, that "It is neither a criminal prosecution, nor a proceeding according to course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they

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are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary."

This language is a part of the opinion of White, J., as found in *Prescott v. State*, 19 Ohio St. 184, 187 [2 Am. Rep. 388], and the same was said with reference to a minor who was committed to the boys' industrial school, then called "The Reform Farm," for an act which, committed by an adult or a person beyond the age of commitment to such reform farm, would have constituted a felony for which he would have been confined in the penitentiary.

This, as we view it, is applicable to the case at bar. The Ohio State Reformatory is a prison for persons who are convicted of felonies and committed thereto upon a sentence of the court following such conviction; but for delinquent children who may be committed thereto after having committed an act constituting a felony it is only a school or place of reformation. It is what its name imports, a reformatory. The case just cited sustains the position of the court in this regard.

We think further that the Supreme Court has affirmed its view of the law relating to such matters in the case of the *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197. In that case it was said by Judge Johnson, page 203:

"The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities for their proper care, and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison."

This more clearly defines the nature of institutions of this kind.

We think that the distinctions drawn in each of these two cases relate equally well to the case at bar, that the Ohio State Reformatory is not intended exclusively as a place of confine-

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ment for criminals, and that upon the passage of proper statutes for that purpose it may be made a place of confinement for juvenile delinquents who may be in need of reformation, as seems to have been true in the case at bar.

For these reasons we are of the opinion that the statute is constitutional that in proceedings under the juvenile delinquent acts there is no right to a trial by jury in which the accused should have the right to face the witnesses and such other rights as are guaranteed by the constitution, and that they may be sent by summary proceedings to said reformatory, as a means to their reformation and not for punishment.

The judgment of the court of common pleas will be reversed, and the court, proceeding to render the judgment that should have been rendered in the court below, dismisses the application for a writ of habeas corpus and renders judgment in favor of plaintiff in error.

Judgment reversed and judgment for plaintiff in error.

Voorhees and Shields, JJ., concur.

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INTOXICATING LIQUORS.

Belmont (7th) Court of Appeals, June 23, 1915.]

Spence, Houck and Powell, JJ.

(Judge Houck of the 5th district sitting in place of Judge Pollock and Judge Powell of the 5th district sitting in place of Judge Metcalfe.)

## HAROLD STEPHENS V. STATE OF OHIO.

Exceptions as to Keeping Intoxicating Liquors in Bona Fide Residence in Dry Territory not Applicable to Rented Room Six by Eight Feet and Without Bed or Bedding or Windows.

Where intoxicating liquor is found in considerable quantities in a room rented by the defendant in dry territory, and in which some of his other property was found, the exception embodied in Sec. 6102 G. C., as to liquor kept in drug stores and bona fide private residences, is not applicable, where the room was but six feet wide and eight feet long and was without bed or bedding.



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**ERROR.**

*Nathan H. Barber*, for plaintiff in error.

*Smith, Howard and Thornburg*, for defendant in error.

**HOUCK, J.**

This cause is here on error from the common pleas court of Belmont county, Ohio. On July 10, 1914, the plaintiff in error, Harold Stephens, was charged in an affidavit filed before Mayor G. A. Colpitts, of Barnesville, Ohio, with a violation of the liquor laws of the state of Ohio.

The affidavit charges that the said Harold Stephens, from July 8, 1914, to July 10, 1914, both inclusive, at the village of Barnesville, county of Belmont and state of Ohio, did then and there unlawfully keep a place where intoxicating liquors were then and there kept for furnishing and giving away as a beverage; that the keeping of said place, as aforesaid by the said Harold Stephens was then and there prohibited and unlawful, and contrary to Sec. 13225 G. C. of Ohio, and against the peace and dignity of the state of Ohio.

The said Harold Stephens was arrested on said charge, taken before said mayor, and entered a plea of not guilty thereto. A trial was had, and he was convicted, and a fine and sentence imposed upon him by said mayor. A motion for a new trial was filed, heard and overruled. To the judgment of conviction and overruling of the motion for a new trial, error was prosecuted to the court of common pleas of this county, and the judgment of the mayor was affirmed, and error is now prosecuted to this court to reverse the judgment of the common pleas court in affirming the judgment of the mayor.

Numerous grounds of error are alleged in the petition in error, but two grounds are relied upon in the brief of counsel for plaintiff in error, to wit:

First, because the testimony is insufficient to sustain the judgment of the court.

Second, because the judgment is against the weight of the evidence and is contrary to law.

The evidence as disclosed by the record shows that the de-

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defendant below, the plaintiff in error, rented a room in a dwelling house occupied by Mrs. Fisher, in the village of Barnesville, Belmont county, Ohio; that said room had no windows in it, and that the next day there was found in said room that was rented by the defendant below, the plaintiff in error, ninety-three bottles of whiskey in three sacks, a whiskey barrel with a small door opening in the side, a coat and a note book therein with the name of Harold Stephens on the fly leaf, and a picture of the mother of plaintiff in error. The evidence shows that the book found in the coat belonged to the plaintiff in error, and that the coat was worn by him at or about the time of his arrest and conviction.

The plaintiff in error claims favor under Sec. 6102 G. C. of Ohio, which reads as follows:

"In a territory in which the sale, furnishing or giving away of intoxicating liquor as a beverage is prohibited, the keeping of intoxicating liquor in a room, building or other place, except in a regular drug store or in a *bona fide* private residence, shall be *prima facie* evidence that such liquor is kept for unlawful sale, furnishing or giving away."

The evidence, as shown by the record in this case, discloses the fact that the plaintiff in error never occupied this room as a residence, and, as a matter of fact, the evidence discloses that there was no bed or bedding in the room, and that the room was about six feet wide and eight feet long, and without windows, and that from the location of the building and its surroundings it would not be a proper room to be used as a habitation.

Counsel for plaintiff in error maintains that the room was a *bona fide* residence of the plaintiff in error, and that therefore the section of the statute above referred to is applicable to the case at bar, and by reason thereof the plaintiff in error was not properly or legally convicted of the offense charged in the affidavit.

From an examination of the record, and relying wholly and entirely upon it, and applying the above section of the General Code thereto, we are of the opinion that the plaintiff in error, the defendant below, was properly and legally convicted under the facts as disclosed by the record; and there being no error

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in the record prejudicial to the rights of plaintiff in error, the judgment is affirmed, and the cause remanded for execution.

Powell and Spence, JJ., concur.

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### ELEVATORS—MASTER AND SERVANT.

[Hamilton (1st) Court of Appeals, July 2, 1913.]

Swing, Jones and Jones, JJ.

PFAU MANUFACTURING CO. v. FREDERICK B. BECK.

1. Projecting One's Foot into an Open Elevator Shaft Proximate Cause of Injury, not Fact of Tying Door Open.

An employe injured by placing his foot inside of, and on a ledge in the way of the descending balance weight in an open elevator shaft, in which he was looking up to locate the elevator, is guilty of negligence, and tying the elevator door to the ceiling, thereby preventing its descending when the elevator was moved from that floor is not the proximate cause of the injury sustained.

ERROR.

*Robertson & Buchwalter* and *T. C. Jung*, for plaintiff in error.

*Milton Saylor* and *Horstman & Horstman*, for defendant in error.

JONES, E. H., J.

This action was brought in the court below by Frederick B. Beck, a minor, by his next friend, Bernard F. Beck, to recover damages from the plaintiff in error, the Pfau Manufacturing Company, for injuries received by said minor while in the employ of said company. The amended petition alleged that at the time of the happening of said injury, plaintiff was sixteen years of age, and was employed on the fourth floor of the factory of the Pfau Manufacturing Company. Just prior to receiving the injuries complained of he was sent by the foreman to the first floor of said building for the purpose of bringing from the first floor some boxes or other material by the freight elevator to the fourth floor. After reaching the first floor and

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after spending some little time collecting the desired material, he looked for the elevator and found that it had disappeared. The petition further states that the gate leading into said elevator shaft on said first floor was tied to the ceiling, thus leaving the entrance to said shaft open; that in order to look up said shaft to see where the said elevator was, it was necessary for him to step with one foot into the shaft, and as there was no way to support himself in looking up the shaft he placed his right foot on the side of the elevator shaft for support while looking up; that the instant he put his foot on the side of the elevator shaft, the weight that is attached to the elevator when descending caught his said foot, causing the injury complained of. The amended petition charges negligence on the part of the defendant: first, in having no one in charge of the elevator; second, in allowing different employees to run it; third, that there was no bell or other means of signalling from one floor to another; and fourth, that the gate on the first floor was tied to the ceiling.

The answer denies any negligence on the part of the company, and further alleges that if it should be found to have been negligent, the plaintiff was guilty of negligence directly contributing to and which was the proximate cause of the injury, and is therefore not entitled to recover.

A number of questions of law are presented by the brief for plaintiff in error, one of which we think decisive of the case, making it unnecessary to consider any other alleged errors. We have reached the conclusion, after a careful reading of the record and the briefs of counsel, that plaintiff's negligence was such in this case as to prevent a recovery. It was a violation of a statutory duty to have the gate leading to the elevator shaft tied to the ceiling, but we can not see that such negligence had any direct connection with the injury to plaintiff. Had the plaintiff by reason of the position of the gate fallen into the shaft and thereby sustained injuries, a different question would have been presented, and it might be claimed that the company's failure to have the gate free to work automatically was the proximate cause of the injury; in case a jury so found, a

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court would not likely be justified in questioning such finding. But here the plaintiff's injury resulted from plaintiff voluntarily walking into the shaft, at least from his partly entering the shaft. It is a matter of common knowledge that the space occupied by an elevator shaft is set apart in such buildings solely for such use, and we can conceive of no situation where a person would be free from negligence in entering a shaft unless for the purpose of oiling or making repairs and then only with the full knowledge of the operator.

We have been cited to no case by counsel for defendant in error where a person either child or adult, who voluntarily placed any part of his body in an elevator and was injured by being struck by the cab, has been held entitled to recover damages, whatever the alleged negligence of the defendant may have been.

On the other hand, the attorney for plaintiff in error has cited in his brief a number of cases holding that such conduct was negligence as a matter of law, such negligence as will preclude a recovery notwithstanding there may have been negligence on the part of the defendant.

We feel that this is unquestionably the law in this state, as well as in other states, and that the evidence in this case shows such a state of facts as that it would be contrary to law and justice to hold the defendant answerable for the injury received by the plaintiff.

We have said that it might have been different had the boy fallen into the shaft by reason of the gate having been permanently tied to the ceiling. It might also have been different, and certainly would have presented a different situation had he been struck by the cab while looking up the shaft; although the cases seem to hold that even in that event he could not recover. But in any event, that is not the case presented in this record. The injuries received were not such as could reasonably have been expected to follow the fastening of the gate to the ceiling, and unless they are in some way connected with the negligence complained of and follow directly therefrom, the defendant could not be held liable. In order to recover from

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the defendant, his negligence must have been the proximate or direct cause. It seems to us clear that such was not the case but that, as above stated, the direct or proximate cause was the negligence of the boy in placing himself in a position which he must have known was dangerous. Having so found, we are of the opinion that the motion made by the defendant below at the close of all the evidence, for an instructed verdict, should have been granted.

The judgment below will therefore be reversed and judgment given plaintiff in error.

Swing and Jones, O. B., JJ., concur.

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ATTACHMENT AND GARNISHMENT.

[Stark (5th) Circuit Court, February Term, 1911.]

Voorhees, Powell and Shields, JJ.

AMERICAN SHEET & TIN PLATE COMPANY V. J. C. LEWIS.

Debt Owed in Other State not Subject to Garnishment.

A valid and binding order of garnishment can not be made against a defendant upon a debt which he owes in another state.

ERROR.

*Amerman & Quinn*, for plaintiff in error.

*J. A. Bowman*, for defendant in error.

POWELL, J.

The original case was before a justice of the peace, and was brought by J. C. Lewis, the defendant in error, to recover against the plaintiff in error as garnishee in a certain action in which J. C. Lewis was plaintiff, and one John Laughley was defendant.

This order was made and entered by a justice of the peace also. The assignments of error in this case are the general assignments, that the judgment is against the law and the evi-

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dence; that the court erred in overruling the motion of plaintiff in error for new trial, and that the judgment was given in favor of defendant when it should have been given for plaintiff in error.

The question raised and presented for adjudication here, is the question whether or not a valid and binding order can be made in an attachment proceeding against a garnishee when the answer of the garnishee discloses that the property sought to be attached—in this case a debt due—was situated in another state than the state of Ohio, or beyond the territorial jurisdiction of the court making such order.

It appears that the plaintiff in error is a foreign corporation, incorporated under the laws of Pennsylvania with its principal office in the city of Pittsburgh, but with branch offices at Chester, West Virginia, and at Canton, Ohio.

J. C. Lewis became the owner of the claim against John Laughley, at Chester, West Virginia, both men residing at that place at that time. The petition and the agreed statement of facts disclose the facts as I now state them. Lewis left West Virginia and came to Canton, Ohio, and brought suit against Laughley before a justice of the peace, and by proper proceedings had an order of attachment issued against the American Sheet & Tin Plate Company, which answered that it was indebted to Laughley for wages in the sum of \$11.85, and \$4 costs of suit, and an order was made against the plaintiff in error, the American Sheet & Tin Plate Company, that it pay this amount of money to the plaintiff in that case, J. C. Lewis.

The garnishee refused to make the payment as ordered; and it is well settled in Ohio that an order against a garnishee is invalid as a judgment because he has not had his day in court; but upon that order suit may be brought, and that is the case here. Suit was brought then by said J. C. Lewis against the American Sheet & Tin Plate Company on the order as above mentioned. The evidence discloses that this debt still exists; this plaintiff in error still has money in its hands due to the said Laughley; his contract was made with the plaintiff in error in West Virginia, and the debt is due in West Virginia.

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Can any of the courts of Ohio make a valid order against a garnishee in such circumstances? Now we think not if it is property that is sought to be reached, and that is so determined by *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543 [57 N. E. Rep. 446; 78 Am. St. Rep. 743]. The court there says:

"Our statutes regulating attachment and garnishment (Section 5522 R. S.), do not give to the court issuing such process jurisdiction over property of the defendant situate wholly beyond the borders of the state, nor power to require a garnishee having property of the defendant in his possession without the state to surrender the same into the custody of the court, and an order on the garnishee requiring such act is without legal effect."

The court in its opinion on page 560, quoted from 8 Am. & Eng. Enc. Law 1156, as follows:

"To charge a garnishee for property of defendant, it is absolutely essential that at the time of service of process he should have it in his possession and within the state."

And the court further says, quoting from the same authority at page 1255, "The domicile of the garnishee does not give the courts of the state jurisdiction over the debt he owes to a party in another state, and is not sufficient to sustain an action *in rem*" (and that is what an action in attachment always is). "This is not determined by his domicile, but by the situs of the property which he holds."

We find also in *Kelley v. Machine Co.* 4 Dec. 374 (6 N. P. 350), a case cited, by the superior court of Cincinnati, the following, to be found on page 378:

"A person can not be subjected to garnishment by the courts of a state in which he may be, temporarily, differing from that of his domicile, unless he has property of the debtor in his possession, or owes him a debt payable in such state."

Second. The domicile of the creditor is the situs of the debt.

Third. A debt due and payable outside of the state that is due from one non-resident corporation to another non resi-



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dent corporation, is not subject to process of attachment and garnishment issued by the courts of such state of which they are not residents.

Now we think that applies to this case. Plaintiff in error is not a resident of the state of Ohio; the debt it owed is to a resident of West Virginia, although that is not exactly this case, because he is an individual and not a non-resident corporation, as in the case cited.

We think this plaintiff in error is not subject to garnishment in the court of Ohio for a debt it owes in West Virginia, and while the court below, we think, obtained jurisdiction over defendant Laughley by his entering appearance here, yet it did not obtain jurisdiction over the subject-matter, so as to make a valid and binding order upon the garnishee.

For this reason, the judgment of the court of common pleas is reversed and the cause remanded for further action in the court below.

Voorhees and Shields, JJ., concur.

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**EVIDENCE—RECORDS.**

[Butler (1st) Court of Appeals, May, 1914.]

Swing, Jones and Jones, JJ.

WALTER S. HARLAN, ASSIGNEE v. LUCY M. HENRY GUNDERSON  
ET AL.

**Unauthenticated Copy of Court Proceedings not Competent as Proof of Question of Fact.**

To admit in evidence a printed record of a cause determined in another court, unauthenticated by the certificate of the judge and clerk of said court, where the matter sought to be established thereby is one of fact is erroneous; but where plaintiff had failed to prove the facts necessary to make his case and the proof so introduced by defendant became immaterial, its admission was not prejudicial or ground for reversal.

**ERROR.**

*John F. Neilan and Andrews & Andrews*, for plaintiff in error.

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*Stanley Shaffer and Baker & Baker*, for defendant in error.

**JONES, O. B., J.**

The question presented to the court by proceedings in error at this hearing is whether or not the action of the court below in entering judgment for plaintiff upon the cross-petition of Walter S. Harlan, assignee of the McSherry Manufacturing Company, should be sustained.

The chief error relied upon by plaintiff in error is the action of the court in admitting the printed record of the case of *Seiler v. Manufacturing Co.* 121 Fed. Rep. 85, 90 [57 C. C. A. 339], inclusive. This report was from the bound volume of the Federal Reports, and was not authenticated by the certificate of the judge and clerk of the court, and was introduced for the purpose of establishing certain facts that were set out in said decision, which plaintiff below contended showed that the litigation there before the court did not embrace the Gunderson patents.

In the opinion of the court the admission of this record by the court below, in the form presented, was error. Under Sec. 11499 G. C., this evidence so offered would have been properly admissible if the question of law there decided was the matter to be proved, but it was not proper evidence to show matters of fact involved in the cause there decided.

The question raised by the cross-petition was whether under the Gunderson contract the cross-petitioner was entitled to recover for expenses incurred in litigating with reference to the Gunderson patents. The burden was upon the cross-petitioner to sustain his account for expenses as set out in his cross-petition by proper proof. A careful examination of the record discloses that by the testimony of Mr. Fetzer, who had been the general manager of the company, it was shown that certain moneys had been expended in matters connected with litigation of patents for the model planter and for the automatic planter, but we find no proof that expenses were incurred with reference to the features of either of the Gunderson patents;

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and, indeed, Mr. Fetzner states that the planters then being manufactured were not based upon said patents.

It will appear that the cross-petitioner failed in his proof to show that the expenses sought to be recovered were thus provided for by its contract with Gunderson, and therefore the admission of the record in *Seiler v. Manufacturing Co supra*, offered by plaintiff can not be deemed as prejudicial.

We fail to find any prejudicial error within the terms of Sec. 11364 G. C., and judgment below is therefore affirmed.

Swing and Jones, E. H., JJ., concur.

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**TAXATION—WILLS.**

[Licking (5th) Court of Appeals, September Term, 1913.]

Powell, Voorhees and Shields, JJ.

**CONSUMERS BREWING CO. v. MARY V. HARDWAY, ET AL.**

1. Contents of Will and Record Destroyed not Established by Single Witness Speaking from Memory after Lapse of Thirty Years.

The contents of a will, which has been destroyed together with the record thereof, can not be established by the testimony of a single witness who speaks entirely from memory after an interval of more than thirty years since he saw the will and heard it read.

2. Tax Title after Fifty Years not Invalidated by Defect in Description of Property Sold.

In order to attack successfully a tax title, the former owner must show some irregularity in the proceedings connected with the tax sale which invalidates the title so conveyed, and where the only defect shown is that the description of the property sold for taxes was not clear, and the present holder and his predecessors in title have been in possession for more than fifty years, it is too late to seek to invalidate the conveyance, and the present holder will be decreed to be invested with an absolute estate in fee simple.

**ERROR.**

*A. A. Stasel and Carl Norpell*, for plaintiff in error.

*Kibler & Kibler, and J. R. Davies*, for defendants in error.

## Licking County Appeals.

**VOORHEES, J.**

Action below was a civil action for partition of real estate in the city of Newark, Licking county, Ohio, described as lot No. 46 in said city. The petition states in substance that one Steven Gill died in 1843, at which time he was the owner of said lot 46 situated on the north side of the public square in the city of Newark.

He died leaving three daughters and three sons. One of said daughters, Mary Anne Cully, died November 8, 1856, without issue; another daughter, Sarah Anne Wadhame, died in 1885, leaving one child, a daughter, to-wit, Janet Hartley. It is claimed by the plaintiffs below that Janet Hartley had three children, but what has become of Janet Hartley or her three children is not disclosed. Another of said daughters, to-wit Eliza M. Kidwell, died November 9, 1909, without issue. Lorenzo Gill, one of said sons, died in 1891, leaving one child, Eliza J. Henthorne; John Gill, another son, died in 1889, leaving Mary V. Hardway, his only child. Steven A. Gill, another of said sons, died in 1912, leaving Mary Francis Gill his only child.

It is contended by the plaintiffs below that said Steven Gill, who died as before stated in 1843, made and left a will whereby he devised to each of his said daughters a life estate in said lot 46 with remainder in fee to their heirs. They further contended that Mary V. Hardway, Eliza J. Henthorne, Steven A. Gill and the unknown heirs of Sarah Anne Wadhame are the heirs of Eliza M. Kidwell who died November 9, 1909, and as such heirs are each entitled to one undivided one-fortieth of her undivided one-third of the south 120 feet of the west half of the said lot 46, and brought this suit for the partition thereof.

The petition further alleges that the Consumers Brewing Company was the owner of the other undivided two-thirds of said lot, and is in the sole and exclusive possession of said premises, denying the rights of the plaintiffs and unlawfully keeps the plaintiffs out of possession of their part of said premises. The petition further alleges that the brewing company

## Brewing Co. v. Hardway.

has received the rents from said premises, amounting to \$300 or more.

The defendant, the brewing company, filed its answer admitting as the first defense that it is in the sole and exclusive possession of said premises, and it denies the rights of the plaintiffs to said premises or any part thereof. It admits receiving of said rents amounting to \$300 or more, and denies all the other allegations of the petition.

For a second defense defendant alleges that plaintiffs' alleged cause of action did not accrue at any time within twenty-one years prior to the commencement of said action.

For a third defense defendant sets up its adverse, exclusive, open, notorious and continuous possession of said premises for more than twenty-one years.

The plaintiffs' reply in effect is a general denial.

The defendant company filed an amendment to its answer, setting up a claim for improvements under the occupying claimant act.

Upon these issues this case was tried to the court. Neither side demanding or waiving a jury, the hearing resulted in a decree in favor of the plaintiff and ordering partition of the premises. All questions as to the accounting for improvements was reserved by the common pleas for a further order of the court.

From this decree the defendant, the Consumers' Brewing Company, appealed to the circuit court, which court on motion of plaintiffs below dismissed the appeal.

From the judgment of the circuit court dismissing said appeal the defendant prosecuted error to the Supreme Court, which court, by a divided court three to three, affirmed the circuit court.

The Consumers' Brewing Company also prosecuted error from the decree of the common pleas to this court, then the circuit court, and filed its bill of exceptions and petition in error.

The errors assigned in the petition in error are:

1. In admitting testimony offered by plaintiffs below against the objection of defendant below.
2. In rejecting evidence offered by defendant below.

## Licking County Appeals.

3. Because the decree, judgment and finding was against the manifest weight of the evidence.

4. Because said judgment, finding and decree was against the law.

5. For numerous other errors stated in the petition in error.

Considering the errors in the order assigned, was there error in the admission of testimony by the plaintiffs below? It is contended by the plaintiff in error that the court erred in receiving the testimony of J. F. Lingafelter as to the contents of the alleged will of Steven Gill, deceased, which was made, probated and recorded some forty years ago. But neither the will nor a copy or any record thereof is produced. It is claimed by the plaintiffs that the original will, as well as the record thereof were destroyed when the Newark courthouse was burned in 1874.

There being no record of the will, or the original will, or a certified copy thereof, or an uncertified copy of the record produced, the only thing left was to produce a witness or witnesses who would testify that they had read the original record and from memory would and could give so much of its contents as to make it clear and satisfactory that the will had been probated, that it contained provisions claimed by the parties offering such proof.

The plaintiffs produced one J. F. Lingafelter, who was permitted to testify from memory as to the contents of the alleged will and the record thereof, although he had not seen the will or a copy of it for thirty-six years. Waiving the question as to the competency of the witness Lingafelter, what probative force, if any, is his testimony entitled to? The witness must be supported by other evidence. The unsupported parol evidence of one person who testifies that he saw and read a deed in the grantee's hands is not sufficient to establish a lost deed. *Smith v. Neff*, 5 Dec. 449 (5 N. P. 495).

In the case of *Cole v. McClure*, 88 Ohio St. 1, the Supreme Court of Ohio reversed the common pleas and circuit court es-

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tablishing and probating a lost will on the testimony of one witness as to its contents.

To establish a lost instrument, deed or will, the evidence must be clear and satisfactory. 7 Cyc. 778f.

Where parol evidence is relied upon to prove a deed alleged to have been lost, such evidence must clearly and satisfactorily show the existence and execution of the supposed deed, and so much of its contents as to enable the court to determine the character of the instrument, *Gilmore v. Fitzgerald*, 26 Ohio St. 171. The same strictness as to proof would obtain where it is attempted to establish the contents of a lost or destroyed record.

The testimony of said James F. Lingafelter as to the contents and conditions of the will of Steven Gill, deceased, contained in the record commencing on page 173 and ending with page 203 needs no comment other than the criticism of Judge Cox, of the United States Court, in the case of *Mack v. Manufacturing Co.* 52 Fed. Rep. 819, 820, where the judge uses this language, concerning such a narrative of facts from memory after so long a period, "That a witness recalling minute details of a trivial event which occurred in his daily vocation thirty years before would be amazing if not miraculous."

2. If the will of Steven Gill was as Lingafelter testified it was, how stands the case in view of the subsequent history and facts disclosed in the record? The will of Steven Gill, as claimed by Lingafelter, gave to his three daughters an estate for life in the property in controversy, remainder to their heirs.

March 17, 1848, Eliza M. Kidwell, one of the daughters, and her husband conveyed her life estate in the property in controversy to George S. Smith, from whom defendant company claims title. March 20, 1848, Mary Anne Gully, another daughter, and her husband conveyed her life estate to George S. Smith. On June 12, 1848, in consideration of \$500 to them paid by said three daughters said sons conveyed the fee in this property to the three daughters by quitclaim deed. On June 12, 1848, Anne Wadhame, the third daughter, and her husband sold a d conveyed to Merwin Cully, husband of Mary Anne Cully not only the life estate of Sarah Anne Wadhame, but

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also the fee simple title in one-third of the premises for \$200. July 24, 1848, Merwin Cully and Mary Anne Cully conveyed to George S. Smith, not the life estate of Mary Anne Cully in one-third of this property, but the absolute title in fee simple for \$450.

Without going into further detail as to the various deeds to Smith, after he received these conveyances he erected a large and valuable building on said lot. The defendant company produced its claim of title for all of said premises, showing an unbroken line of conveyances from the president of the United States to the plaintiff in error, the Consumers' Brewing Company, and they further show an actual, open, notorious, exclusive and continuous possession under color of right in these premises since 1845, a period of sixty-seven years.

On the second Monday of January, 1845, these premises were offered for sale by the county treasurer of Licking county to pay delinquent taxes, interest and penalties and were not sold for want of bidders. On the second Monday of January, 1845, these premises were forfeited to the state of Ohio under the statute then in force governing forfeited land sales.

On the second Monday of December, 1845, these same lands were sold by the county auditor under the act of March 1, 1831, providing for the sale of lands forfeited to the state for non-payment of taxes, being the same statute that is now in force under Sec. 2899 R. S. The land was sold to one F. H. Woodbridge, August 15, 1846, and a deed was executed by the auditor of the county to Woodbridge under said sale. September 19, 1846, said F. H. Woodbridge and wife conveyed these premises by quitclaim deed to one William A. Boss. August 4, 1848, William A. Boss and wife conveyed said premises to said George S. Smith. November 10, 1849, said George S. Smith and wife conveyed the same premises to Michael Morath, in which deed there is this recital: "Being the same premises heretofore occupied by the said George S. Smith, on which there is a three-story stone building known as the Bazaar in said city." June 22, 1889, Michael Morath conveyed these premises to Philomena Worley. June 20, 1889, A. J. Grilley, sheriff of said county,



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conveyed these premises to L. P. Schaus and J. H. Hibbert. On July 17, 1897, said premises were set off and assigned in severalty to the said L. P. Schaus in partition in and by virtue of an action pending in the common pleas court in said county, in which L. P. Schaus was plaintiff and Anna Chilcote and others were defendants, being case No. 10,119 of the records of court of common pleas of said county.

At the April term of said court for the year 1897 said partition was confirmed by the court and the clerk was ordered to have so much of said decree recorded as would show the transfer of title of said land. On December 11, 1905, L. P. Schaus and wife conveyed said premises to the Consumers' Brewing Company, a corporation, which is now the owner and holder of said premises and the plaintiff in error in this action. The foregoing citations show a complete chain of title from the state of Ohio in 1846 to the Consumers' Brewing Company, plaintiff in error, covering a period of sixty-five years.

The only attack made upon said title by the defendants in error is their contention that the tax deed to Woodbridge for the forfeiture of lands for the nonpayment of taxes was not a legal conveyance and was void and passed no title for the reason of a defective description in the tax deed or upon the duplicate for the sale of forfeited lands to the state. Under the act of March 14, 1831, in force at the time these lands were sold for taxes, as well as in Sec. 2899 R. S., when lands are forfeited to the state for nonpayment of taxes all former titles to said lands are divested and extinguished, and the effect of the tax sale was to work a forfeiture of all the prior estates of the owner, and the auditor's deed for forfeited land sold under said act of March 14, 1831, is *prima facie* evidence of title, and may be given in evidence without any preliminary evidence. The statute throws upon a person seeking to avoid this deed the burden of showing that the proceedings prior to its execution were illegal. Such a deed is not only *prima facie* evidence, but the Supreme Court of Ohio in case of *Ward v. Barrows*, 2 Ohio St. 242, held:

"In favor of the acts of public officers, the law will presume all to have been rightly done, unless the circumstances of

## Licking County Appeals.

the case overturn this presumption; and consequently, as stated by the Supreme Court of Ohio in *Bank of the United States v. Dandridge*, 12 U. S. (12 Wheat.) 70, 'acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.' "

The auditor's deed was *prima facie* evidence without any proof of the regularity of the proceedings resulting in the sale of the land. *Turney v. Yeoman*, 14 Ohio 208; *Woodward v. Sloan*, 27 Ohio St. 592.

The effect of this rule, as before shown, it to shift the burden of proof by imposing on the party asserting the invalidity of the deed the duty of showing it to be void for want of compliance with the statute in the proceedings leading to the alleged forfeiture. As we have said, the only objection to or defect of the tax deed is that is rendered void because the description is not good; that is, that the words "50 feet off the west half of lot 46" does not describe the property in controversy. This lot 46 is a lot 99 feet east and west and 198 feet north and south in the city of Newark, as shown by the plat offered in evidence. If this deed had described it as the "west half of lot 46" the description would be perfect, but it says "50 feet of the west half of lot number 46."

"Of" is a preposition meaning "belong to." "A description in an auditor's deed need not be of a greater certainty than any other conveyance by deed of individuals, and the same is to be literally construed to carry out the intention of the parties."

It is held in *Schlieff v. Hart*, 29 Ohio St. 150, that "extraneous testimony is admissible to identify land conveyed by the following description, to-wit, 'a tract or lot of land known as the east half of the southwest division of Sec. 17, although such testimony shows that the land so conveyed is less in quantity than a mathematical half of the division.'"

Without pursuing the discussion further as to the validity of the tax deed, how can the former owners have any interest in these forfeited lands to the state for nonpayment of taxes? The state owns the fee simple title to the property and can make

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a sale of the same under the law. To attack a title of this kind the former owner must show some irregularity that will invalidate the forfeiture. The only alleged irregularity in this deed is as to the description, and we do not think it such a defect as to invalidate the title conveyed by the auditor in his deed made August 15, 1846. Under these deeds the plaintiff in error and its predecessors in title, from whom it claimed, have been in possession for over fifty years. We think it too late to attack the validity of this conveyance, and if the conveyance is legal it passes all the title, legal and equitable, owned by the prior owners of said premises, and vests in the plaintiff in error by succession an absolute estate in fee simple; and being of this opinion we must hold there was error in the court below in finding that the title to this property, or any part, or it is in the defendants, and for these reasons the judgment of the court below is reversed and the cause is remanded to the common pleas for new trial and further proceedings according to law.

**Powell and Shields, JJ., concur.**

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**MUNICIPAL CORPORATIONS.**

[Hamilton (1st) Court of Appeals, July 12, 1913.]

**Swing, Jones and Jones, JJ.**

**PLEASANT RIDGE (VIL.) v. DAYTON LIMESTONE CO.**

1. **No Cause of Action against Village for Material Used in Street Improvement, without Compliance with Statutory Requirements.**

A cause of action is not stated against a village on an account for material used in improving its streets, where there is no allegation that a certificate issued as to there being sufficient money in the treasury and unappropriated to meet the proposed obligation, or advertisement was made for bids for the work, or that the obligation was to be met by the proceeds from an issue of bonds; nor can the argument prevail that because the material so furnished was actually used by the village it became morally bound to pay the claim.

## Hamilton County Appeals.

**ERROR.**

*Stanley W. Merrell*, Assist. city solicitor, for plaintiff in error.

*Paxton, Warrington & Seasongood*, for defendant in error.

**JONES, O. B., J.**

Plaintiff in error seeks to set aside a judgment by defendant in error in the court of common pleas for \$1,500 and interest for stone furnished and delivered for the improvement of its streets.

The record shows that the stone was furnished on four written orders addressed to the Lewis & Talbott Stone Co., three of them for 369 cubic yards of stone at \$1.35 per cubic yard, signed by "John Petzer and William B. Thesing. S.S.G. Committee," and the other for 389 cubic yards signed by "John Petzer, S.S.G. Committee." No written contract was entered into and signed by the proper village officers, no advertisement for bids was made and no certificate from the village clerk was filed showing that money was in the treasury set apart to meet the proposed expenditure. The stone was delivered and used on the village streets. A partial payment was made on the account, and a question being raised as to payment for the balance claimed, an ordinance was passed by the village council February 18, 1907, "to allow the claim of the Lewis & Talbott Stone Company for material furnished for use on the streets of Pleasant Ridge," and the clerk was directed to issue a warrant against the "first available funds," and the treasurer was directed to pay over such amount to the Lewis & Talbott Stone Company or their attorneys or agents the sum of \$1,500 in full settlement of said claim of the Lewis & Talbott Stone Company. No certificate was attached to such ordinance that there was money in the treasury to meet such expenditure.

The petition below does not state a cause of action. It fails to set out a valid contract, as it does not comply with the municipal code, under Sec. 3806, G. C., there being no certificate that there is money in the treasury set apart to meet the expenditure; or under Sec. 4221 G. C., which requires an advertisement when the expenditure is in excess of \$500; nor does

*Pleasant Ridge v. Limestone Co.*

the evidence show that these provisions were complied with, and defendant therefore can not be held. *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52]; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 [54 N. E. Rep. 372]; *Comstock v. Nelsonville*, 61 Ohio St. 288 [56 N. E. Rep. 15]; *Wellston v. Morgan*, 65 Ohio St. 219 [62 N. E. Rep. 127].

Plaintiff below however relied upon the case of *Emmert v. Elyria*, 74 Ohio St. 185 [78 N. E. Rep. 269], claiming that bonds were to be issued to raise money to pay for resurfacing the streets and that the stone furnished by plaintiff was used as part of such work. The record fails to support that claim.

Nor can the argument prevail that because the material furnished was actually used by the village it thus became morally bound to pay the claim. Such an argument might be heard in a suit to prevent the village from making such payment if it so desired, but it can not be used in a suit like this at bar where the village is resisting payment in a suit filed to recover the value of the materials. This argument was used unsuccessfully however in the case brought by Castner, a taxpayer, against the village of Pleasant Ridge, to enjoin the payment of the same claim involved in this case. The opinion of the common pleas court in granting a perpetual injunction is reported in *Castner v. Pleasant Ridge*, 18 Dec. 539 (7 N. S. 174), and it does not appear but that the decree entered therein is still in full force. The village set up this decree as a defense to this action. While the plaintiff here was not a party to the record in that case, and is therefore not concluded by that decree, yet it seems inconsistent that the same court should enter that decree enjoining the village from paying the claim, and then in this suit brought to enforce the same claim, enter a judgment compelling payment by the village.

The record also fails to show how the plaintiff here became the owner of a claim for materials furnished by the Lewis & Talbott Company.

The judgment below is therefore set aside and judgment will be entered for plaintiff in error.

Swing and Jones, E. H., JJ., concur.

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## HOMICIDE.

[Hamilton (1st) Court of Appeals, July 5, 1913.]

Swing, Jones and Jones, JJ.

## \*ABRAHAM SMILE V. STATE OF OHIO.

1. Misnomer from Misspelling Accused's Name in Indictment for Murder not Raised by Motion for Arrest of Judgment.

The misspelling of the name of the defendant in the indictment under which he was tried does not present a question which can be raised on a motion for arrest of judgment.

2. Use of Numerals to Designate Degree of Murder in Verdict Reprobated but not Reversible Cause.

The use in a verdict in a case of homicide of a figure to designate the degree of murder of which the defendant has been convicted, while to be reprobated as bad practice, does not prejudice the defendant nor afford ground for a reversal of the judgment.

## ERROR.

*Charles O. Rose*, for plaintiff in error.

*Thomas L. Pogue and Walter M. Locke*, for defendant in error.

## JONES, O. B., J.

Abraham Smile was placed on trial under an indictment charging murder in the first degree in the killing of one Lucy Smile, otherwise known as Lucy McDyer, on June 21, 1912, after defendant had filed a motion to quash and a demurrer to the indictment, both of which were overruled, and had entered a plea of "not guilty" to the indictment against him as Abraham Smile, and after the jury had been impaneled and sworn and all of the evidence heard, at the request of the defendant the suggestion was made that the real name of the defendant was Abraham "Smiley," and at his request the clerk was directed to make the change accordingly in the proceedings. Defendant was found not guilty of murder in the first degree but was found guilty of murder in the second degree.

\*Leave to file petition in error refused by Supreme Court, *Smile v. State*, 58 Bull. 391.

**Smile v. State.**

No motion was filed for a new trial, but within three days after the return of the verdict the defendant filed his motion in arrest of judgment and for the discharge of the defendant. Proceedings in error are predicated upon the overruling of this motion.

Two errors are relied upon by plaintiff in error:

First. A failure of proof as to the name of the deceased;

Second. The verdict does not find defendant guilty of any offense under the laws of Ohio but amounts to a verdict of not guilty.

It is claimed that each of these errors entitled the defendant to his discharge.

1. Considerable argument is made by counsel for plaintiff in error based upon the question of the name of the plaintiff in error, claiming that the name "Smile" was essentially different from the name "Smiley." If, as is the case with the names of most foreigners the name written "S-m-i-l-e" were pronounced in two syllables, having a syllable for each vowel, it would receive the same sound as if written "S-m-i-l-e-y." The evidence shows without question the identity of the woman who was killed, and there is no question that her first name was Lucy. She was known as the wife of the defendant and had lived with him as such, which would be sufficient proof that her proper name might be Lucy Smile; and the testimony shows that she was also known as "Lucy McDyer." The case therefore does not come within the case relied upon the plaintiff in error of *Goodlove v. State*, 82 Ohio St. 365 [92 N. E. Rep. 491; 30 L. R. A. (N. S.) 134; 19 Ann. Cas. 893]. In that case it should also be noted that a motion for new trial had been interposed. Such a motion is necessary in order to review the question of evidence. *Everett v. Sumner*, 32 Ohio St. 562.

The only questions that can be raised on motion for arrest of judgment are those set forth under Sec. 13748 G. C.; *Myers v. State*, 2 Circ. Dec. 712 (4 R. 570); *Carper v. State*, 27 Ohio St. 572.

2. The form of the verdict which was criticized is as follows:

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"We, the jury, in issue joined find defendant Abraham Smile, right name Abraham Smiley, is not guilty of murder in the 1st degree as he stands charged in the indictment. and guilty of murder in the 2nd degree."

Objection is made by counsel to the use of the numerals in describing the degrees of the crime of murder. If the form of this verdict was drawn by the clerk, as was stated in argument, it certainly is to be reprobated, as the words "first" and "second" should have been written out in full in any form so prepared; and we observe that the transcript of the record shows an indiscriminate use by the clerk, in making up such record, of numerals and words, which is not to be commended. In view, however, of the provisions of Sec. 13581 G. C., that an "indictment shall not be invalid" \* \* \* because "dates and numbers are represented by figures"; \* \* \* we think that the use of figures in the verdict as in this case can not be prejudicial to the defendant, as there is no uncertainty as to what these figures mean, the Arabic figures in combination with the letters being as clear in their meaning as the words would be if fully written out in letters alone.

Judgment below will therefore be affirmed.

Swing and Jones, E. H., JJ., concur.

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ELECTION—SPECIFIC PERFORMANCE.

[Hamilton (1st) Court of Appeals, July 1, 1913.]

Swing, Jones and Jones, JJ.

\*SAM LEE, ET AL., v. JOSEPH S. THOMA.

1. Electing to Invoke Specific Performance Bar Action for Damages. An action for specific performance is a bar to a subsequent action for damages alleged to have been sustained through failure of the defendant to carry out the contract which forms the basis of the first suit.

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\*Affirmed, no op., Lee v. Thoma, 91 O. S. 444.



**Lee v. Thoma.****ERROR.**

*Thorndyke & Capelle*, for plaintiffs in error.

*W. A. Hicks, J. R. Jordan and Worthington & Strong*, for defendant in error.

**JONES, O. B., J.**

The action below was brought by plaintiff to recover damages for failure to carry out a contract to lease certain premises at 514 Vine street together with an entrance, same to be used for a chop suey restaurant, the term of the lease to be four years. Plaintiffs took possession after making the contract, and occupied said premises for a few months. Defendant made changes in the entrance and stairway to which plaintiffs objected and finally moved out of the premises and filed suit in the court of common pleas on June 15, 1911, in case No. 148116, to compel the specific performance by the defendant of his contract for the execution of a lease for four years under the conditions prescribed in the contract. On December 4, 1911, this suit was dismissed without prejudice at plaintiffs' costs.

In the meantime, on August 22, 1911, plaintiffs filed a suit in an action for damages suffered during the period of plaintiffs' occupancy against defendant for failure to carry out the same contract, which is the suit now under review.

In this case below an answer was filed practically admitting the making of the contract and its performance by the defendant, and as a fourth defense set up the suit brought in action No. 148116 of the court of common pleas for specific performance of this contract and claiming "that in filing said suit plaintiffs thereby elected to pursue their remedy of specific performance for the alleged failure of this defendant to comply with the provisions of said contract, and by such election are barred from prosecuting this action for damages."

To this defense plaintiff demurred, which demurrer was overruled by the court, and plaintiffs rely upon the error of the court below in overruling such demurrer.

In the opinion of this court the demurrer to the fourth defense was properly overruled. Plaintiffs elected in filing their

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first suit to compel specific performance, and having made their election they must rely upon that, and can not now abandon that suit or bring an action for damages for breach of the same contract. *Zutterling v. Drake*, 30 O. C. C. 661 (10 N. S. 167); 7 Enc. Pl. & Pr. 364.

Judgment below is therefore affirmed.

Swing and Jones, E. H., JJ., concur.

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CANALS—PATENTS.

[Licking (5th) Court of Appeals, 1913.]

Powell, Voorhees and Shields, JJ.

(Voorhees, J., not sitting.)

ISAAC JONES v. WM. P. MYERS.

ISAAC JONES v. JAMES T. HAYNES.

Title to Borrow Pits Adjacent to State Canal Reservoir is in Patentee and Successors and not in Lessees of State.

Admitting that certain depressions adjacent to the embankment surrounding a canal reservoir are borrow pits from which earth was taken in constructing the embankment, the act of the state in so excavating and removing the earth, or in subsequently tilling the depressions in order to drain them of water seeping out of the reservoir, did not amount to an appropriation of the land from which earth was thus removed; and in the absence of any evidence that title to these pits was acquired by the state by selection, under the act of congress of May 24, 1828, a lease of such lands by the state is void as against the title of one holding by a direct line of mesne conveyances to himself from the United States under a patent issued in 1843.

*Kibler Z Kible*, for plaintiffs.

*Flory & Flory*, for defendants.

POWELL, J.

These two cases came into this court by appeal, and are submitted together, being identical in the issues presented, both of fact and of law. The plaintiff seeks to have his title and possession quieted to a tract of land described in his petition; the defendant Myers claims the right of possession to the west half,

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and the defendant Haynes to the east half of the same land; and both ask that their title to the same be quieted as against the plaintiff or those claiming under him. Plaintiff's right is the same in each case, and the defendant's separate rights are acquired from the same source and by the same instrument of lease.

Plaintiff claims title to the land described in the petition, under a patent from the general government issued April 10, 1843, and by a direct line of *mesne* conveyances from the United States to himself. The land described in the patent is the N. W. 1-4 of the S. W. 1-4 of S. 13, T. 17, and R. 18, refugee land containing a fraction over forty-three acres. Across this tract and running in a northeasterly and southwesterly direction is the northwestern embankment of the Licking reservoir, now called Buckeye lake, so that the southeastern part of the said forty-three acre tract is covered by the bank and the waters of the lake; the part of said tract not covered by the lake is owned and occupied by the plaintiff, Isaac Jones, and has been so owned and occupied by him since 1879. No question is made by any of the parties to this suit as to the title of so much of said tract as is covered by the waters of the lake or the said embankment. This title is conceded to be in the state of Ohio by lapse of time and adverse possession as against parties holding under the patent from the government. But adjoining the embankment on the northwest side are what is known as "borrow pits" or places from which the earth has apparently been removed for the purpose of constructing the said embankment, which is an artificial bank built to retain the waters of the lake above the level of the lands on that side, thereby creating low places adjoining the outer edge of said embankment the entire length of so much thereof as lies on plaintiff's said lands. These low places thus made vary in width from a point at or near the eastern end up to 150 feet and are estimated at an average of 100 to 125 feet in width along the entire embankment on plaintiff's said land. It is this line of borrow pits along the northwesterly side of Buckeye lake across the lands of plaintiff that is involved in this action, plaintiff claiming title under a patent

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from the government supplemented by actual possession of the premises by him from 1879 up until the present time, and the defendants claiming the right of possession by lease from the state of Ohio, which claims title to said borrow pits either by virtue of the act of Congress of May 24, 1828, granting 500,000 acres of land to the state of Ohio for the purpose of assisting in the construction of the canal system of the state, or by appropriation under the act of the legislature of Ohio of February 4, 1825, providing for the construction of said canal system and authorizing the appropriation of land or materials for that purpose. The evidence shows that the canal system was completed some time in 1832; the date of the patent for the lands described is April 10, 1843, so that it is a contest between two titles emanating from the government as to which conveys the better rights to the premises involved in this action, under the respective titles thus claimed. Buckeye lake, formerly Licking reservoir, is a part of the canal system of Ohio, and although it is now dedicated as a public park for the benefit of the citizens of the state, it was originally constructed as a part of that system.

The common source of title to all lands in Ohio is the general government and the patent issued by the general government is usually conclusive as to the title under it. The court can, however, inquire whether or not such title is in conflict with any other prior legal or equitable title to the same land. The state claims to own these lands either by virtue of a selection of the same under the act of congress, or by an appropriation under the statutes of Ohio providing for the appropriation of lands in the construction of the canal system. No evidence was offered of any selection of this particular tract of land ever having been made. The statute, which authorizes such selection, provides that the same shall be made within two years from the date thereof, under the authority and by the direction of the governor of the state of Ohio, and that when such selection has been made, he shall report the same to the land office of the district where such land lies, and the lands so selected should be granted by the United States to the state of Ohio. If this

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had been done so as to show a transfer of title under this statute to the state of Ohio, there ought to have been a record of it, and since no such record has been offered, we conclude that it was not done and that the state did not acquire title to these lands by selection under this statute. There is no question made as to the line or chain of title from the patentee under the patent of April 10, 1843, to the plaintiff. His title is good provided the state had not acquired a prior title by virtue of an appropriation under the statute of February 4, 1825. It has been repeatedly held in Ohio that an appropriation under this statute conveys absolute title in fee simple to the state, and when such title actually vests in the state, it can not be defeated by a claim of adverse possession or by lapse of time, but remains in the state until conveyed away by virtue of some duly authorized proceeding.

Claim is made on the part of the plaintiff that by reason of the continued use and possession of these borrow pits by the plaintiff, his title would become complete as against the state by adverse possession. This position is not tenable, as adverse possession does not run against the state. Plaintiff's possession of these borrow pits was either as a matter of right under his title from the government, or by sufferance of the state of Ohio.

The claim is also made on behalf of the defendants that because seepage from the lake through the embankment, and the overflow, at times of high water, found its way down into these borrow pits, and that afterwards the state tilled out the borrow pits constituted an appropriation of the same. But the evidence does not show that these borrow pits are made by the state with the intent or purpose that the same should constitute a drain or ditch to carry off such seepage and overflow for the benefit of the lake or the canal system of Ohio. The seepage and the overflow from the lake through its waste weirs found its way to the borrow pits simply by operation of the natural law by which water runs to the low places until it finds its level and did not find its way there by reason of any construction on the part of the state in such a way as to constitute damage for

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such seepage and overflow. If these borrow pits had been constructed by the state with that end in view and not as a result simply of excavating the soil for other purposes, it would present a different question, as such construction might then have been considered as an appropriation of the land itself for the benefit of the canal system.

The claim is also made by the plaintiff that no such appropriation was ever had, on the part of the state, of the lands in controversy as would carry with it a title to the same; that such appropriation as is shown here, if one was ever made, would convey only the materials taken from the land and used by the state in the construction of the artificial embankment of the reservoir or lake. And there is no direct evidence in the case that any such appropriation was ever had. It is true that the topography of the land supplies an inference that the soil that was formerly in these borrow pits was taken out and used in the construction of such embankment, but no witness testifies to this as a fact.

To constitute an appropriation within the meaning of the law, the thing appropriated must be taken into actual ownership, possession and use. To appropriate anything for the canal system, it must become a part of that system.

"Where the possession and use of lands or streams in the construction of the Ohio canal system were merely incidental, constructive or indirect, and not of a character to fairly apprise both the officers of the state and the owners of the lands, that such lands or streams were appropriated and used in the construction of the canals, no fee to such lands or streams vested in the state." *Miller v. Wisenberger*, 61 Ohio St. 561 [56 N. E. Rep. 454].

Again it will be remembered that if any appropriation of these lands was made by the state in the construction of the canal system, such appropriation was made while the title to said lands was still in the general government, as no patent was ever issued until more than ten years after such canal system had been completed.

The case of *State v. Fenn*, 21 Dec. 593 (10 N. S. 325), is

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authority for the proposition that appropriation by the state did not operate on unpatented lands under this statute.

"Section 8 of the act of February 4, 1825, the substance of which was an appropriation by the state of all lands, waters and streams taken possession of by the canal commissioners, vesting the fee in the state, did not operate on unpatented United States lands, such as the land involved in this case was."

This case also holds that as against the general government the state could not obtain title either by appropriation under this statute or by lapse of time. It is conceded, however, that as against a patentee the state could acquire title. for this reason, no claim is made in this action for so much of the land described in the patent as is inundated by the waters of the lake or covered by the embankment built to retain the same. As was said before, there is no direct evidence that these borrow pits, so-called, were made by the state in obtaining materials for the construction of the embankment of the lake; but admitting that such was the case, was the act of the state in excavating and removing the soil adjacent to such embankment an appropriation of the lands from which such soil was removed so as to vest the title to the same in the state? This court is of the opinion that it was not; that the appropriation contemplated by the statutes is an actual appropriation or taking possession of the land itself as a part of the canal system and that removal of soil from the surface of the lands for the purpose of constructing an embankment, and for no other purpose is no more an appropriation of the fee to the land itself than if such land had been covered with stone or timber and the same had been removed by the state for use in the construction of such embankment. It is an appropriation of the material used and of that only. This was authorized by the terms of the statutes above referred to.

Finding as we do that the state did not acquire title by selection or, at least, that there is no evidence whatever that the title to these lands was so acquired, and that the state was without any title as against the general government, we think that it could not acquire title as against the patentee of the govern-

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ment, who acquired his title subsequently to such appropriation, unless there would be a new act of possession with a claim of ownership on the part of the state after such patent had been issued. There is no evidence whatever of anything of this kind, nor is any claim made to this effect.

To recapitulate:

1. The plaintiff has title from the government for the lands in controversy through the patent issued to Jacob Grove, April 10, 1843, by intermediate conveyances to himself.

2. There is no evidence that the state acquired title to these lands by selection under the act of congress, of May 24, 1828.

3. If the state acquired title by appropriation under the act of the state legislature of February 4, 1825, it must have acquired it before the canal system was completed in 1832, and before the land in controversy was patented in 1843, and while the title thereto was still in the general government. This could not be done.

4. The acts relied on by the state to show an appropriation of the lands described are insufficient for that purpose.

5. There has not been any appropriation of these lands by the state, since the patent for the same was issued.

Hence, we conclude:

1. That the state has no title to the lands in dispute, and its lease to the defendants for the same is void and of no effect.

2. That the plaintiff has title thereto, and is entitled to the relief prayed for in his petition.

A decree may be entered in conformity with this opinion, quieting the title of plaintiff and making the injunction, heretofore allowed, perpetual. The cross petitions of the defendants will be dismissed at their costs.

**Shields, J., concurs.**



*Railway v. Brooks.***RAILWAYS.**

[Cuyahoga (8th) Circuit Court, June 26, 1905.]

Marvin, Winch and Henry, JJ.

**LAKE SHORE & M. S. RY. v. CHARLES BROOKS.**

**Duty of Employe to Look and Listen Before Going Upon Tracks.**

Employes whose duties require them to cross the tracks in the yards or at the depots of railways are bound to observe a strict lookout; hence, they are required to look just before going upon the track, or so near thereto as to enable them to get across before a train within the range of their view of the track, going at the usual speed of fast trains, would reach such crossing.

**ERROR.**

*Brewer, Cook & McGowan*, for plaintiff in error.

*Wm. T. Clark and W. H. Boyd*, for defendant in error.

**HENRY, J.**

This proceeding in error is brought to reverse the judgment of the court of common pleas. The parties stand here in the relation opposite to that in which they stood below.

Defendant in error, while employed in the repair shops of the plaintiff in error, was struck by a backing engine and seriously injured, while in the act of crossing a track in the railroad yard right in front of the shop door. He brought an action for damages and recovered a large judgment. The only question that we need consider is whether Brooks is chargeable with contributory negligence, for we have no difficulty in coming to the conclusion that the company was negligent and that Brooks did not resume the risk of such negligence.

The facts were presented to us very vividly by means of diagrams and photographs. It is doubtful whether any useful purpose will be served by our attempting here to translate those pictures into words. Suffice it to say that Brooks had long been employed in the shop. At the time of the accident, however, he was repairing a locomotive on one of the tracks in the yard,

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sixty or seventy feet diagonally from the shop door. He had expressed the opinion that the job ought to be done in the shop; but we attach no importance to that utterance. In order to obtain the tools which he needed from time to time for his job, he was obliged to go back and forth between his place of work and the shop many times a day, the tools being let out only two or three at a time by means of a check system. One of the yard tracks was close to and parallel with the front of the shop. Engines and cars passed along this track frequently, and Brooks had to cross the track in going backwards and forwards with tools. On this track, in the same general direction as Brooks' place of work, but farther on, there was a turntable 110 feet distant from the shop door in front of which the accident occurred. From this turntable many tracks radiated. Brooks noticed a large locomotive tender standing apparently alone on the turntable when he started from his place of work towards the shop for a tool on the occasion of his injury. As a matter of fact a small engine was behind the tender, but obscured from view. He looked around once or twice as he walked in the wide space between the tracks towards the shop door, and saw the tender still standing on the turntable. When opposite the shop door he started to step across the track and was struck by the tender which had come silently up behind him. The engine and tender started and ran 110 feet after he had last looked. It came up behind him at least twice as fast as he was walking. Was Brooks under all these circumstances excused from looking just before he started across the track? In his behalf it is claimed that he was excused because his workshop must be held in effect to have included his place of work and the intervening space, over which, in the course of his work, he was obliged to pass and repass.

It is claimed that he was entitled to a safe place to work, without the necessity of dodging engines and cars while intent upon his work. Defendant in error has at once aided and embarrassed us with a brief so voluminous that we can not discuss it in detail. There are however three recent decisions of the Ohio Supreme Court on which he relies. They are: *Railroad*

*Railway v. Brooks.*

*Co. v. Margrat*, 51 Ohio St. 130 [37 N. E. Rep. 11]; *Cleveland, C. C. & St. L. Ry. v. Kernochan*, 55 Ohio St. 306 [45 N. E. Rep. 531]; *Snyder v. Railway*, 60 Ohio St. 487 [54 N. E. Rep. 475].

The Margrat case, so far as the syllabus goes, decides nothing but a question of fellow-servant. On the facts as disclosed by the opinion it appears that Margrat, a brakeman, was by the nature of his duties and surroundings obliged to walk on the track at the time he was injured. He was overtaken by an engine which he had seen on another track a long distance away and which he had no reason to suppose would come on his track at all. And Margrat was at the time obliged to hurry with his mind intent upon his work. It was a close case and it does not govern this one.

The Kernochan case is another one wherein a railroad man in the performance of his duties was necessarily on a track. His hearing was obscured by the noise of the train passing on another track. His sight was obscured by darkness. Cars were backed down upon him, with no warning light or warning noise. Without these he had not the means of protecting himself. That case is not like this.

The Snyder case is that of a station agent who was obliged to stand on the main track while unloading a car on the adjacent track. He was necessarily relying on the others to keep a lookout for his safety while he was intent upon his work. That case is to be distinguished from the one in hand.

Plaintiff in error relies upon two later decisions of the same court. First of these is *Wabash Ry. v. Skiles*, 64 Ohio St. 458 [60 N. E. Rep. 576]. The first paragraph of the syllabus in that case is as follows:

"The rule of law which excuses passengers from the obligation to observe a strict lookout for trains and locomotives when alighting from or getting upon trains over the tracks of a railway company, does not apply to employees whose duties may require them to cross the tracks in the yards or at the depots of the railway."

We are totally unable to distinguish this case from the one at bar. We think it necessarily refutes the theory that Brooks

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was in contemplation of law in his employer's workshop and under no necessity to observe a strict lookout.

The other case is that of *New York C. & St. L. Ry. v. Kistler*, 66 Ohio St. 326 [64 N. E. Rep. 130]. True it is not the case of an employe; but, as we have just seen, the rule as to lookout is the same for employes, except under special circumstances, as it is for anyone else not a passenger. The fifth paragraph of the syllabus is:

"The looking required before going upon a crossing, should usually be just before going upon the track, or so near thereto as to enable the person to get across before a train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach such crossing."

Manifestly, Brooks did not look "just before going upon the track." If he had, he would have been able to have seen the tender approaching. There was absolutely nothing to obscure his view. We can not escape the conclusion that he is as a matter of law chargeable with contributory negligence.

The judgment below must therefore be reversed, and inasmuch as the facts are conceded and admit of but one conclusion, we deem it not only proper but logically necessary that we should proceed as we do now, to render the judgment which the common pleas court should have rendered, and enter judgment for the plaintiff in error here.

**Marvin and Winch, JJ., concur.**

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## TRUSTS—WILLS.

[Cuyahoga (8th) Circuit Court, June 26, 1905.]

Marvin, Winch and Henry, JJ.

S. M. NEVILLE, ET AL., EXRS. V. EUGENE LUCIEN CARLET, ET AL.

**1. Bequest to Trustees for the Benefit of Three Persons in Certain Proportions Creates Only One Estate.**

Where testator gave the residue of his estate to trustees, to hold one-third part, with all the income therefrom, for the use of his widow for her life, one-third for the use of his son for life, and one-third for the use of his daughter for her life, and after the death of his wife the property given for her use, to be held for the use of his son and daughter in equal shares; Held: Not to create separate trust estates but that the whole trust estate should be kept as one entire fund and the income divided among the legatees.

**2. Annuitant Entitled to have Surplus Applied to Satisfaction of Prior Deficiencies in Annuity.**

Where the income from property upon which an annuity is charged, is for several years insufficient to pay the full amount of the annuity, but in later years leaves a surplus after the payment of the annuity, the annuitant is entitled to have such surplus applied to the satisfaction of deficiencies in the annuity for the years it was not paid in full.

### APPEAL.

*Olds & Willet*, for plaintiff in error.

*M. B. & H. H. Johnson*, for defendants in error.

### HENRY, J.

The action below was one to construe a will. Of the questions presented there, only three are again urged here. The last of these questions is premature, and we do not feel justified in undertaking to decide it now. This question is the one relating to the executor's duty when one or more of Amanda M. Neville's children shall die. They are all alive now, and may survive for many years. When the exigency arises, the executor may then confidently seek the assistance of the courts in ascertaining his duties in the premises. It is now an academic question which we must decline to entertain.

On both the other questions our view accords with that of

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the court below, as expressed in the learned opinion of Judge Lawrence. We find confirmation of this view on two several decisions not cited by him or by counsel. In *Bell v. Towner*, 55 Conn. 364 [11 Atl. Rep. 185], the syllabus is:

"A testator gave the residue of his estate to trustees, to hold one-third part, with all the income therefrom, for the use of his widow for her life, and one-third for the use of his son T for life, and one-third for the use of his daughter M for life; and after death of his wife the property given for her use, to be held for the use of his son and daughter in equal shares for their lives. Held not to be the intent that there should be three separate trust estates during the life of the wife and two afterwards but that the whole trust estate should be kept as one entire fund and the income divided equally among the legatees."

We think that case is very much in point with the case before us.

On the other question, *Chauncey, In re*, 119 N. Y. 77 [23 N. E. Rep. 1000; 7 L. R. A. 361], the syllabus is:

"The will of K gave her residuary estate to her executors in trust, to receive rents, profits and income and after paying therefrom certain specific annuities, among them one of \$500 to D, her adopted son, for his support during minority, and \$1,000 thereafter during the life of her husband during his life. After his death to pay to D \$2,000 per annum during his life. D survived the husband, and for a number of years after the death of the latter the annual income was insufficient to pay the said annuity in full. Subsequently it exceeded that amount. Upon a settlement of the accounts of the trustee, held, that, in the absence of any language in the will showing a different intent, D was entitled to have the surplus applied in the first balance to the satisfaction of deficiencies in the annuity for the years it was not paid in full."

There are some cases cited in the opinion of the court in this case, the syllabus of which I have just read, which are, perhaps, even more in point than is this one, but I will not stop to read them now.

Counsel will see that the journal entry is drawn in accord-

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ance with the holding of the court below, excepting as to the one question which we find is prematurely presented here.

Marvin and Winch, JJ., concur.

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### NEW TRIALS.

[Cuyahoga (8th) Circuit Court, October 27, 1905.]

Marvin, Winch and Henry, JJ.

\*INDEPENDENT COAL CO. v. C. N. QUIRK, ET AL.

1. Second Motion for New Trial Based upon Different and Unknown Ground of First Motion Filed within Three Days.

A second motion for a new trial may be filed within the three days allowed for filing such motions, when it is based upon a different ground and one not known at the time of filing the first motion.

2. Designating Second Motion for New Trial as Amendment to First Motion is Immaterial.

It is immaterial that a second motion asking for a new trial, upon a different ground from that set forth in the first, is designated by the pleader as an amendment to the first motion.

3. Forty Days for Filing Bill of Exceptions Runs from Overruling Second Motion for New Trial.

Where there has been a second motion for a new trial filed in season, the forty days allowed for filing a bill of exceptions will date from the overruling of the second motion, notwithstanding the overruling of the first motion and entering of judgment on the same day upon which the second motion was filed.

ERROR.

*Kerruish Chapman & Kerruish*, for plaintiff in error.

*Hamilton & Hamilton*, for defendants in error.

HENRY, J.

This proceeding was brought to reverse a judgment for \$333.67, recovered at the January, 1905, term of the court of common pleas of Cuyahoga county, by C. N. Quirk and P. F.

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\*Affirmed, no op., Independent Coal Co. v. Quirk, 80 O. S. 746.

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Waltham, partners under the firm name of Northern Ohio Coal & Coke Supply Company, an Ohio corporation, in an action upon a contract for the sale and delivery of coal by said partnership to said corporation. The parties here thus stand in the relation opposite to that in which they stood in the court below.

After this proceeding in error was commenced, a motion was interposed by the defendants in error to strike the bill of exceptions from the files, upon the ground that the record shows it to have been filed after the expiration of the time limited by law for such filing. Upon diminution of record being suggested by the plaintiff in error, in this, to-wit, that the certified transcript of docket and journal entries filed herein failed to contain the entry of the order made by the court of common pleas, refusing an amendatory motion for new trial, filed by the defendant below. We entertained this suggestion and permitted the plaintiff in error to procure a correct transcript. Defendant in error's objection that the transcript could not thus be amended, after the expiration of the four months period allowed by statute for the commencement of a proceeding in error, was subsequently withdrawn, in view of the rule laid down in *Falconer v. Martin*, 66 Ohio St. 352 [64 N. E. Rep. 430]. The motion to strike the bill of exceptions from the files was, however, still urged upon the ground that the time for filing the same was begun, not from the date of the overruling of the amendment to the motion for a new trial but from the prior date when the original motion for a new trial was refused; and that, on this view, the forty days had expired when the bill was filed.

The transcript discloses this state of facts, namely: verdict rendered March 25, 1905; motion for new trial filed March 27; amendment filed March 28; motion overruled and judgment entered March 28; amendment to the motion for a new trial overruled May 12; bill of exceptions filed May 16. It will be observed that both the motion for a new trial and the amendment thereto were filed within the three days allowed by law; that the motion was overruled before that period had expired; that the overruling of the motion took place on the same day as



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the filing of the amendment, and that if we consider the order in which they are recorded in the transcript as indicating the order in which the events occurred, the amendment was filed before the motion was overruled. It should be noted, furthermore, that the amendment alleges a ground for new trial not averred in the original motion, and that it was alleged by the mover and found by the court that this new ground was unknown to the former when the original motion was filed. On this state of facts it is claimed that the motion and the amendment must be deemed to have been acted upon together, and that the subsequent action of the court, in overruling the amendment alone, was therefore vain and nugatory. Or, if we take the view that the order of events, as recorded in the transcript, is not conclusive with respect to actions which took place in a single day, and that the amendment may therefore be deemed to have been filed after the overruling of the original action, it is still urged that the court below could not make a valid order overruling it, for several reasons, viz: first, because it is not competent to file an amendment to a motion which is no longer pending. Secondly, there is no authority for filing within term, a second motion for a new trial, however styled, after a first motion has been disposed of. Thirdly, the ruling, on the first motion, especially when coupled, as it was, with the entry of judgment on the verdict, as required by the present statute, renders the asserted right to a new trial *res judicata*, and hence a bar to entertaining a subsequent motion in the same behalf. And if the court, in the exercise of its proper control over its own orders and judgments during term, might have vacated its first order overruling the motion for a new trial and also the judgment that was entered thereon, in order that it might entertain a second motion to the same end, it is argued that no such procedure was observed in this case, and the judgment that was first rendered therein still stands, despite the fact that no judgment could lawfully be entered by the clerk until after the motion for new trial, if any, was finally overruled.

The whole question thus presented is, so far as we have discovered, a novel one. Two of the points made, may however,

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be brushed aside at the outset. There is, we think, no significance in the mere name "amendment to motion for new trial," which need hinder us from treating this as an independent motion, if the ends of justice shall so require. Compare *Klonne v. Bradstreet*, 7 Ohio St. 323. Neither is there anything conclusive about the order in which independent events are recorded in the transcript, if they took place on the same day and the record contains no express recital as to the order of their occurrence.

We have then this question, whether a party may, within three days after the return of a verdict against him, and after the overruling of his first motion file a second motion for a new trial upon a new ground that was not known by him to exist when his first motion was made. The sections of the Revised Statutes, relative to applications for new trial within term, are 5305 to 5308 inclusive, and they contain no express provision forbidding the practice here in question. Nor does the doctrine of *res judicata* apply strictly to mere motions even where such motions result in orders that are reviewable. We entertain no doubt that the trial court has full power to permit the filing of a second motion under these circumstances, and while it did not expressly give such permission in the present instance, the fact that it entertained the second motion, by hearing and disposing of it, on its merits, conclusively implies such permission (14 Enc. Pl. & Pr. 176, 183, 184 and 191, and cases cited). The fact that judgment was meanwhile entered by the clerk upon the verdict, whether prematurely or otherwise, under the provisions of Sec. 5326 R. S., is not of itself a bar to an application for a new trial. Applications of that nature may be made even after term under Sec. 5309 R. S., if the ground alleged therefor was not previously discovered by the party applying. It is true the application, if made after term, must be made by petition; but in cases where judgment is entered by the clerk, after three days have elapsed without any motion for a new trial having been filed, it can not be doubted that under 5307 the application for a new trial may still be made at the same term by the mere motion of a party who has been "unavoidably prevented from

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filing the same within such time." In this case the motion was filed within three days, and having been heard on its merits by the court below, we hold that the evidence introduced respecting the ground of new trial therein asserted, might be, and in this case was, incorporated into a valid bill of exceptions filed within forty days after the overruling of said motion. Whether the grounds for a new trial, that were asserted only in the original motion, can be thus reviewed, we do not now decide.

The bill, which we have thus determined to consider, avers that it contains all the evidence adduced on the hearing of said motion. It is claimed, however, that this averment is plainly untrue, for the reason that the court found as a fact that the ground alleged in the motion was unknown to defendant below when his original motion was filed, whereas there is no evidence in the bill upon the subject. The record is perhaps silent as to the evidence, if any, heard by the court upon the question whether the motion was filed under circumstances which would permit it to be heard at all; but the court having affirmatively found that question in favor of the plaintiff in error, we can not in the present status of this case, and on the mere suggestion of the defendant in error, review that finding. And with respect to the evidence heard concerning the ground asserted for a new trial, we must treat the averment of the bill as conclusive in the absence of any disclosure to the contrary.

The bill exhibits the affidavit of the bailiff temporarily acting as such in the trial court when this cause was tried and who was also a witness for the defendant. No other evidence was introduced on the hearing of the motion. He says that, during the progress of the trial, members of the jury discussed with him, and he with them, at intermissions, the general merits of the case, and particularly the meaning of the term "local trade," which was in issue therein. It is true that he was a witness for the defeated party; but his affidavit avers his familiarity with the coal trade, and we can not presume that the interchange of opinions between him and members of the jury was not prejudicial. Such conduct is grossly improper, and its inevitable tendency is in subversion of justice. We think it

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showed such conduct of the jury as not only to warrant but to require a new trial. The judgment below is accordingly reversed and the cause remanded.

Marvin and Winch, JJ., concur.

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**ATTORNEY AND CLIENT—DISBARMENT.**

[Ashland (5th) Circuit Court, June Term, 1913.]

Powell, Voorhees and Shields, JJ.

IN RE. H. L. McCRAY.

**1. Retention of Larger Portion of Amount Recovered and Ground for Disbarment of Attorney.**

The retention by an attorney of a larger portion of the amount recovered than the client believed to be warranted by the contract of employment, does not constitute ground for disbarment, where the client is an aged man and his inconsistent and contradictory testimony as to the terms of the contract indicates that if not an unreliable witness he is at least very forgetful.

**2. Collection of Fee for Services Subsequently Regarded as Unnecessary not Moral Turpitude.**

The collection from the guardian of an imbecile of a fee of \$5,000 for services which resulted in a compromise whereby a large amount of cash and securities were turned over to the guardian, \$2,000 of which fee was paid to another attorney for services in the same behalf, is not rendered an act of moral turpitude by the fact that these services were subsequently regarded as unnecessary and a finding to that effect was made in the common pleas court.

**VOORHEES, J.**

This cause is in this court by appeal from the court of common pleas of Ashland county, Ohio, and is submitted to the court upon the complaint in writing against said H. L. McCray preferred by order of the judges of the court of common pleas of the sixth district of Ohio, wherein, among other things, it is charged, as set out in the first specification under said charge, that said Henry L. McCray was guilty of unprofessional conduct involving moral turpitude in this, to-wit:

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On or about October 1, 1889, said Henry L. McCray as an attorney and counselor at law was retained and employed by one Ludwig Scheriff, a resident of Ashland county, Ohio, to prosecute a certain action against the county treasurer of Ashland county for the recovery of \$1,456 which a certain tax inquisitor, one E. A. Bowman, claimed was due from said Ludwig Scheriff to said county as back taxes, and which amount was paid.

Said Henry L. McCray as attorney for said Ludwig Scheriff subsequently filed a petition in the court of common pleas of said county praying judgment against the treasurer of Ashland county for the sum of \$1,456 and interest from October 5, 1898.

On or about December 6, 1900, a compromise was effected between said Henry L. McCray, attorney for said Scheriff and the county treasurer on the basis of \$792.02, whereupon said Henry L. McCray received and receipted to the auditor for said sum of \$792.02 December 6, 1900, and signed said receipt, "McCray & McCray, attorney, L. Scheriff"; three or four weeks after McCray & McCray, received said \$792.02 from the county treasurer; \$150 thereof was turned over to said Scheriff; that said amount is all that said Scheriff received; said H. L. McCray then and there converting the balance thereof, to-wit, \$642.02, to his own use and benefit, and refused thereafter to pay said Scheriff any further part thereof, though often requested so to do.

Said cause was heard in the court of common pleas to the judges of said sixth district upon said complaint and the specifications thereunder, resulting in a finding by said court that said Henry L. McCray has been guilty of misconduct in his office of attorney and counsellor at law involving moral turpitude as set forth in said specifications. It was therefore ordered and decreed by the court that the said Henry L. McCray, be, and he is removed from his office of attorney and counselor at law in the courts of the state of Ohio, and that the name of the said Henry L. McCray be stricken from the roll of attorneys.

To this finding and judgment of the court the said Henry L. McCray appealed to said circuit court and such proceedings

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were had in the premises that said cause was duly appealed to said court and the same came on for hearing at the June term, 1913, of the court of appeals of said county, which court is the successor in jurisdiction of said circuit court, to which the cause was appealed as aforesaid, and the same was submitted at said June term upon said complaint and the evidence.

The case was tried in said court on the testimony taken in the court below, and by agreement of the parties the transcript of the testimony, so taken, was submitted to the court, together with additional oral testimony in behalf of said Henry L. McCray, which transcript and oral testimony were offered by the parties on the trial and were all the evidence in the case.

In support of said complaint said Ludwig Scheriff was sworn and testified. An examination of the record containing said Scheriff's testimony discloses the fact that Mr. Scheriff is an old gentleman some eighty years of age and that his testimony is indefinite and contradictory in many particulars, but it is apparent that the transaction out of which said controversy grew was a claim of Mr. Scheriff's for the recovery of taxes that had been wrongfully assessed against him and paid, and to recover back taxes so collected from him, which amounted to over \$1,500. He called upon Judge McCray in reference thereto, and it was concluded on consultation that a suit should be brought to recover back said taxes, and by agreement between Mr. Scheriff and Judge McCray the fees were to be one-half of the amount recovered back from the county.

The case was finally compromised for the sum of \$792.02. The compromise was brought about in this way. If the case had proceeded to trial Mr. Scheriff would necessarily have been a witness, wherein he would have been subject to examination concerning his property, etc., and this he absolutely refused to do. Rather than be a witness he was willing that the whole sum might be lost so far as he was concerned, as he would not go into court and subject himself to an examination. Thereupon negotiations were entered into whereby a compromise was effected for the amount above stated, viz., \$792.02, and this sum was paid to Judge McCray. Afterwards \$150 was paid to Mr.

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Scheriff and a receipt was given by him to Judge McCray for \$400. Scheriff claims that this amount was never paid to him and he denied in his testimony that he had agreed to give one-half of the amount recovered back to the attorney for collecting the same. An examination of the testimony of Mr. Scheriff shows that he was either very forgetful or that his testimony is inconsistent and unreliable.

On the other hand, Judge McCray testifies in his own behalf concerning the transaction, and his testimony is clear and convincing as to the transaction from its inception to its final determination, and shows that in place of there being a wrongful appropriation of any part of this money recovered back, that the judge was more than generous in settling with this old man and paying him more money than he was entitled to under the contract that he had made for the collection of the claim on account of back taxes paid.

It is very apparent to the court that old Mr. Scheriff had been used by some designing parties to institute complaint against Judge McCray, and without any ground therefor was willing to make complaint that he had not been paid his share of the money that was so refunded by the county for taxes that had been wrongfully collected from him. The court thinks that the whole trouble in the matter grew out of some jealousy or ill-feeling by some parties against Judge McCray, and that they could and did wrongfully use this old man to induce him to make these charges against the judge, and this court is surprised, in view of the testimony that was given in this case and the nature of the testimony as given by Mr. Scheriff, how the court or the judges thereof ever could have arrived at a conclusion or result that Judge McCray in this transaction was guilty of misconduct as an attorney involving moral turpitude, and we think that the judgment and finding of the court is not supported by the evidence, but is manifestly contrary thereto.

Therefore, the judgment of this court is that the specification under charge number 1 is not supported by sufficient evidence and is contrary to the evidence.

It is also charged that H. L. McCray is guilty of unpro-

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fessional conduct in his office as attorney and counselor at law involving moral turpitude in this, to-wit:

From the records of the probate court of Ashland county it appears that on or about October 4, 1904, one E. F. Shelley was appointed guardian of one Paul Oliver and his estate and duly qualified and entered upon his trust; that such proceedings were thereafter had as compelled him to file an inventory and account of his administration of said trust, to which inventory and account exceptions were filed and heard, among which were exceptions to a large amount paid to said Henry L. McCray, to-wit, about \$5,000.

It further appears that the same was heard before Wickham, Judge, in the court of common pleas on or about the fifteenth to the eighteenth day of June, 1909, both inclusive, and resulted in a disallowance of the said \$5,000, which said guardian paid to said H. L. McCray for alleged services rendered. In that proceeding it was found by the court of common pleas that the payment of the said \$5,000 was not a legal or proper charge in whole or in part.

The facts concerning this transaction are that said E. F. Shelley, under a claimed power of attorney to act for Paul Oliver, went to the office and secured the services of said H. L. McCray for the purpose of getting the custody and control of about \$26,500 belonging to said Paul Oliver, then in the hands of one S. A. Raridon, cashier of the First National Bank of Loudonville, Ohio, in which bank Paul Oliver was a director and president.

The legal services which said McCray was called upon to do and which he did were to prepare and file a petition for an injunction, commanding said Raridon to deliver the certificates or money to said E. F. Shelley; that the date of this claimed contract for legal services was prior to the appointment of E. F. Shelley guardian; that the action was brought by the said H. L. McCray for E. F. Shelley individually against S. A. Raridon, and in no way connected the name of Paul Oliver with such transaction. That said Raridon had retained as his attorney in the matter of Jesse Hissen, of Loudonville, Ohio, which



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appears of record in the appearance docket volume 28, page 394 of the records of said court of Ashland county.

Without going into too much detail as to the specifications under this charge, it is sufficient to say that in support of this charge said S. A. Raridon was sworn and testified, and from his testimony it appears that Raridon was the cashier of said bank at Loudonville, in which said bank Mr. Paul Oliver was a large holder of stock, and had funds in said bank aggregating some \$62,000. That there was \$26,500 in cash which was evidenced by certificates of deposit issued by said Raridon payable to his order. Said certificates were for the amounts following, to-wit: two for \$10,000 each, one for \$5,000 and one for \$1,500. Raridon had possession of these certificates, and Mr. Oliver becoming uneasy about the financial responsibility of Mr. Raridon, wanted to have the certificates turned over to him. This Raridon refused to do, and thereupon Mr. Oliver called upon Judge McCray to consult him with reference thereto, and upon consultation it was concluded to bring an action. Said E. F. Shelley as the friend of Oliver and later his guardian consulted with Judge McCray as to what would be the best course to pursue to get said certificates from said Raridon.

Upon consultation with Mr. Oliver and other parties interested with the bank, it was thought best not to bring a suit directly against Raridon by the bank for said certificates, as such a proceeding it was feared might hurt the credit of said bank. Therefore a different plan was adopted than to have a suit brought by Mr. Oliver as president or otherwise of the bank or the bank itself. Before any action was taken it was agreed by Mr. Oliver with Judge McCray that if he would recover back said certificates that his fee should be \$5,000.

A petition was prepared and filed asking for an injunction restraining him from disposing of said certificates. Mr. Hissem, an attorney at law residing at Loudonville where said bank was situated, and who was the attorney for said bank, upon application to court for permission to withdraw said petition from the files, temporarily obtained such an order, but said petition

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seemed to have been mislaid or lost and was never returned to the files in said court.

After considerable controversy between Mr. Raridon, Mr. Hissem and the sheriff, Mr. Raridon finally endorsed said certificates and turned the same over to Sheriff Homan in the bank at Loudonville.

Judge McCray testified in his own behalf as to this transaction and his connection with Mr. Paul Oliver in the bringing of the suit and the agreement as to what the fee should be. Mr. Oliver proposed that if he recovered back these certificates that he would give him \$5,000. Judge McCray's testimony is clear and convincing as to this transaction and shows that it has none of the elements of fraud or moral turpitude such as is contemplated by the statute, Sec .1707 G. C., regulating proceedings for disbarment of attorneys for misconduct in office.

It seems from the testimony and the record in this case that it finally resulted in a compromise between the parties concerned whereby the certificates were turned back to the sheriff by Mr. Raridon, but to accomplish this through Mr. Hissem it seems that there was some claim made by him that he should be paid for his services in connection therewith. The matter was submitted to Mr. Oliver, but he was unwilling to give anything more than the \$5,000 and that whatever was to be paid in the way of costs or attorney fees had to be paid out of the \$5,000 that was to be given to McCray for the recovering of these certificates. Mr. Hissem insisted that he was entitled to fees, and his first claim was that he should have one-half of the \$5,000. Judge McCray thought this was unreasonable and unfair to him, and he protested against paying that amount, and finally it was agreed that Hissem was to receive \$2,000 for his services, which was paid. The balance of the \$5,000 would rightfully belong to Judge McCray.

Taking this whole transaction as disclosed by the testimony of Raridon and McCray, this court is satisfied that there is no just ground or reason for the judgment that was found and rendered by the court of common pleas or the judges thereof hearing the case. Taking into consideration the relation of

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these parties to each other, meaning Oliver, Raridon and Hissem, and in view of the testimony of Raridon and Judge McCray, this court is clearly of the opinion that there is no ground for a finding that said Henry L. McCray has been guilty of unprofessional conduct involving moral turpitude in the management of either the case of Scheriff or Oliver as set forth in the specifications upon which said cause was tried, and as we have had occasion to say in connection with the complaint against Judge R. M. Campbell, *post*, we are at a loss to see upon what ground or theory the court of common pleas or the judges thereof, found the charges one and two or the specifications thereunder true as against said Henry L. McCray. This court, on the contrary, is of the opinion that said charges are not supported by any sufficient evidence, and that there was no misconduct on the part of said Henry L. McCray in connection with said matters of said Ludwig Scheriff or said Paul Oliver.

Therefore, the court is unanimous in the opinion that said charges and specifications are not sustained by sufficient evidence and there are no grounds justifying the disbarment of said Henry L. McCray as an attorney at law from practising in the courts of the state of Ohio or for striking his name from the list of attorneys in said state, and the judgment of this court is that said complaint be, and the same is, hereby dismissed, and said Henry L. McCray restored to all rights and privileges of an attorney at law in the state of Ohio, and that he be restored to all rights that he has lost by reason of said complaint and the proceedings thereunder had in the court of common pleas, and that he recover his costs in this proceedings against the state of Ohio.

The other charges and specifications contained in said complaint are not supported by any evidence in the case to warrant a finding or judgment against the said Henry L. McCray, and therefore the same are dismissed.

**Powell and Shields, JJ., concur.**

## Cuyahoga County Circuit.

## NEGLIGENCE.

[Cuyahoga (8th) Circuit Court, May 29, 1905.]

Marvin, Winch and Henry, JJ.

HARRY H. BRINKMAN V. CUYAHOGA LUMBER CO.

**Burden of Proof not on Plaintiff to Show Absence of Contributory Negligence.**

Contributory negligence is ordinarily a matter of defense and a charge "that before the plaintiff can recover he must show that he was not to blame himself and that his own negligence did not contribute to his injury" was error.

ERROR.

HENRY, J.

The action below was for damages for personal injuries, and the judgment of the court of common pleas must be reversed for error in the charge as follows: "It is his (the plaintiff's) business to show that the injury which he sustained was because of the negligence of the defendant, or of his teamster, and that it was not because of his own negligence." And again: "The first thing that you will have to determine, before you can find a verdict for the plaintiff, is that he was injured through the negligence of the defendant company by its teamster, and that he was not to blame himself, and that his own negligence did not contribute to his injury."

The burden of disproving contributory negligence was thus cast upon the plaintiff where it does not ordinarily belong. There was nothing in this case to take it out of the ordinary rule, nor is there anything else in the charge curative of the error thus committed.

Reversed and remanded.

Marvin and Winch, JJ., concur.

Campbell, In re.

## ATTORNEY AND CLIENT—DISBARMENT.

[Ashland (5th) Court of Appeals, June Term, 1913.]

Powell, Voorhees and Shields, JJ.

IN RE ROBERT M. CAMPBELL.

1. Specific Evidence as to Nature and Extent of Attorney's Services not Overcome by Uncertain Negative Testimony of Pecuniary Interest.

An action for recovery of compensation for services rendered by an attorney for the benefit of a decedent during her lifetime and in the settlement of her estate after her death, negative testimony given by persons having a pecuniary interest in the estate, to the effect that they had no knowledge of the rendering of such services, can not be accepted as overbalancing direct and convincing testimony as to the extent and nature of the services, given by the attorney himself and corroborated in large measure by testimony by the executor of the estate.

2. Abandonment of Claim by Attorney, after Stubborn Contest Confronted, not Conduct Involving Moral Turpitude Requiring Disbarment.

Nor does the fact that counsel for the said attorney abandoned the claim, and ordered that it be withdrawn, when confronted by a stubborn contest in court, disprove in any wise the merit of the claim; and an order disbarring the said attorney for unprofessional conduct involving moral turpitude in presenting and prosecuting such a claim will be set aside.

### VOORHEES, J.

This cause is in this court by appeal from the court of common pleas of Ashland county and is submitted to the court upon the complaint in writing against said Robert M. Campbell preferred by order of the judges of the court of common pleas of the sixth district of Ohio, wherein, among other charges and specifications, charge number two charges that said Robert M. Campbell was guilty of unprofessional conduct involving moral turpitude in this, to-wit: ff

First Specification. "On or about the first day of October, 1907, said Robert M. Campbell presented to one George A. Ullman, executor of the estate of one Mary Freer, deceased, a claim for compensation for services as an attorney at law alleged to have been rendered by said Campbell to said Mary Freer

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during her lifetime, which claim amounted to \$2,400, which claim was allowed by said executor. In fact the said Campbell had rendered no such service to said Mary Freer and had no claim against her said estate, or if any services were so rendered by said Campbell, the claim so presented was largely in excess of the reasonable value of such services.

"By means of the aforesaid claim the said Robert M. Campbell obtained from George A. Ullman, as executor of the estate of said Mary Freer, deceased, the sum of \$2,400 of the money of said estate, thereby defrauding said estate and the legatees under the will of said Mary Freer, deceased."

Said cause was heard in the court of common pleas to the judges of said sixth district upon said complaint on said charge number two and the specification thereunder and the evidence, resulting in a finding by said court that said Robert M. Campbell has been guilty of misconduct in his office of attorney and counselor at law involving moral turpitude as charged in the second charge of said specifications. And it was

"Ordered and decreed by the court that the said Robert M. Campbell be, and he is, hereby removed from his office of attorney and counselor at law in the courts of the state of Ohio, and that the name of the said Robert M. Campbell be stricken from the roll of attorneys."

To this finding and judgment of the court the said Robert M. Campbell appealed to said circuit court, and the court fixed the bond for said appeal at the sum of \$100. Thereupon such proceedings were had in the premises that the appeal of said cause to said circuit court was perfected and the same came on for hearing at the June term, 1913, of the court of appeals of said county, which court is the successor in jurisdiction of said circuit court, to which said cause was appealed as aforesaid, and the same was submitted at said June term upon said complaint and the evidence.

The case was tried in this court on the testimony taken in the court below and by agreement of the parties the transcript of testimony so taken was submitted to the court in behalf of the respective parties the same as if the witnesses were offered and examined in open court. The transcript and the evidence offer-

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ed by both parties on the trial were all the evidence in the case.

In support of said second charge and the specifications thereunder a number of witnesses were called and testified, among whom were Francis J. Freer, Mrs. James Smith, Bertha Boyd, Mrs. Francis Freer, Judge McAdoo, Harry L. Hess, Mrs. Frank Freer, Frank Freer and J. A. Shearer. The testimony of these witnesses may be designated as negative testimony. They do not assume to know anything direct upon the claim involved in said charge number two, and the only reason that they give why said claim is not a valid claim against the estate of said Mary Freer, deceased, was that they never saw Judge Campbell at the home or residence of said Mary Freer, never saw him in consultation with her or doing any business for her, and therefore they came to the conclusion that he had no valid claim against her estate.

Most of these witnesses are relatives of said Mary Freer, deceased, and therefore directly interested in said estate. While they are only collateral heirs, yet they are financially and pecuniarily interested in said estate, and upon this class of testimony and of this negative character the court found the said Robert M. Campbell guilty of misconduct as an attorney at law involving moral turpitude.

Said complaint is based under favor of Sec. 1707 G. C., and should receive a strict construction, and the complaint should be sustained by clear and convincing proof, if not by proof beyond a reasonable doubt.

To this complaint said Robert M. Campbell offered himself as a witness and testified as to his relations to said Mary Freer and her estate which came to her from her deceased husband, one Jonas Freer. It seems from the history of the case and Judge Campbell's connection therewith that he had been the attorney of said Jonas Freer and his brother, Randolph Freer, for a number of years and had been their advisor and counselor in many of their business affairs; that they had a large estate and many transactions of a legal nature of importance, in all of which Judge Campbell was the advisor and counselor; that upon the death of said Jonas Freer said estate passed to and became

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the property of said Mary Freer. Among other assets of said estate were some six or seven farms in said Ashland county, together with real estate situated in the city of Ashland, and said Mary Freer, having been aware and advised of the fact that Judge Campbell had been the advisor and attorney of her husband, sought his advice, and also through her agent, said George Ullman, who during her life from the death of her said husband was her agent managing her business matters, including the management of said farm. In connection with said business said agent, George Ullman, consulted said Robert M. Campbell and at her solicitation communicated to said Robert M. Campbell. He also called on her at her residence a number of times in consultation concerning her business matters, among which was the preparation of wills for herself. And by express agreement made with said George Ullman, as agent of said Mary Freer, and with her knowledge and consent, it was agreed that said Robert M. Campbell should be the advisor of said Ullman in reference to the legal matters concerning said estate, and this condition continued until the death of said Mary Freer, but no compensation was paid to him during the lifetime of said Mary Freer. It was understood between said Mary Freer, Ullman and Campbell that the compensation was to be paid at the death of the said Mary Freer, and in addition to the compensation for services rendered during the lifetime of said Mary Freer he was to represent said Ullman as the executor of said Mary Freer's estate.

Said Robert M. Campbell's statement of the services performed and his relations to said Mary Freer and said George Ullman is given in detail and very frankly by said Robert M. Campbell, in such a way and manner that it certainly refutes any of the negative claims that are made by the witnesses for the complaint as hereinbefore referred to. His testimony is entitled to more favorable consideration and weight than all the negative testimony of the interested parties, wherein their only reason for their theory of the case that there was no just claim against said Mary Freer's estate was that they never saw said Robert M. Campbell at her home or in consultation with her.



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But in addition to the statements of Judge Campbell, much of his testimony is corroborated by said George Ullman, especially with reference to business matters of said estate in which they had the benefit of said Robert M. Campbell's advice and experience as a lawyer. So that if said Robert M. Campbell was not the attorney of said Mary Freer during her lifetime so that she could be considered a client, she evidently was what might be termed a sponger upon the time and services of said R. M. Campbell.

It no doubt is within the range or experience of every lawyer of extended practice, that there is a class of persons who, while they do not pay attorneys, are always willing to receive their advice and counsel in reference to business matters pertaining to their estates, and the larger the estate the greater the benefit that class of clients receive with the least expense to them.

It appears from the testimony in the case that in fact there was nothing paid on said claim, although a receipt was given by said R. M. Campbell, but there was no money actually paid. The only thing that was done in that regard was that a check was given for the amount, but with the understanding and on the condition that the same was not to be paid until the rumored exceptions to be filed to the account of said executor were heard and determined. It seems that the counsel for said R. M. Campbell, and perhaps the judge himself, lost their nerve in the trial of this case, and in open court directed and consented that said claim be withdrawn and the same was withdrawn. This fact does not necessarily discredit the validity of said claim. The only thing that it tends to show is, as has been indicated, want of nerve in counsel to fight for a claim which seemed to be just and fair, and the fact that it was withdrawn does not carry with it necessarily evidence of the claim not having merit, or that the same was not an honest and just claim against said estate. We think under the circumstances as disclosed in the evidence in this case that the claim was just and should have been paid.

Taking into consideration the relation of these parties, in view of the testimony of Judge Campbell and the executor,

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George Ullman, this court is clearly of the opinion that there is no ground for a finding that said R. M. Campbell has been guilty of unprofessional conduct involving moral turpitude in the management of said estate, and in the claim he presented to the administrator for allowance. This court is at a loss to see or find upon what theory the judges of the court of common pleas found the charge number two and the specifications thereunder true. On the contrary this court is of the opinion that said charge is not supported by any evidence and that there was no misconduct in the presenting of an account to the executor of said Mary Freer's estate under the circumstances and conditions upon which the services or much of the services charged in said account were rendered and performed.

Therefore the court is unanimous in the opinion that said charge number two is not sustained by sufficient evidence and that there are no grounds justifying the disbarment of said Robert M. Campbell as an attorney at law from practicing in the courts of the state of Ohio, or for striking his name from the list of attorneys in said state, and the judgment of this court is that said complaint be, and the same is hereby dismissed, and said R. M. Campbell is restored to all the rights and privileges of an attorney at law in the state of Ohio, and to all rights that he has lost by reason of said complaint and the proceedings thereunder had in the court of common pleas, and that he recover his costs in this proceeding against the state of Ohio.

The other charges and specifications contained in said complaint are not supported by any evidence in the case to warrant a finding or judgment against said Robert M. Campbell, and therefore the same are dismissed.

**Powell and Voorhees, JJ., concur.**

Kreimer v. State.

## CRIMINAL LAW—INTOXICATING LIQUORS.

[Hamilton (1st) Court of Appeals, December 6, 1915.]

Jones, Jones and Gorman, JJ.

HENRY KREIMER v. STATE OF OHIO.

**Affidavit and Judgment Showing First Offense Reversal not Granted for Failure of Record to Show such Fact.**

Failure of the record to show, in a prosecution for keeping open on Sunday a place in which intoxicating liquors are sold on other days of the week, that the offense charged was the defendant's first offense, does not require a reversal of the judgment of conviction, where the affidavit and judgment show it was his first offense, and there is no transcript of the evidence to show that anything to the contrary appeared during the trial.

ERROR.

*John A. Deasy*, for plaintiff in error.

*E. S. Morrissey*, for defendant in error.

**GORMAN, J.**

Plaintiff in error Henry Kreimer, was charged in the affidavit filed in the municipal court of Cincinnati on August 30, 1915, with having knowingly and unlawfully allowed to remain open on the first day of the week commonly called Sunday a certain room in which intoxicating liquors were sold on other days of the week than on Sunday, contrary to the form of statute in such case made and provided.

This was a case involving a violation of Sec. 13050 G. C., which prohibits places being open on Sunday which are on other days of the week used for the sale of intoxicating liquors.

Upon this affidavit a warrant was issued, and Kreimer was apprehended and appeared in the municipal court on August 30. He asked and obtained a continuance of his case until September 15, 1915. On that day the following entry was made:

"This cause coming on for hearing upon the affidavit and warrant filed herein, defendant being in court and arraigned, pleaded not guilty and court hearing the testimony find said

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defendant guilty and do order said defendant to pay \$25 and costs, but upon further consideration court do order \$15 of said fine to be suspended."

Section 13050 G. C., among other things also provides for a second offense, for keeping open a place on Sunday where liquors are sold on other days of the week, and that the party convicted shall be fined or imprisoned. Therefore, it appears that if the case were a second offense against Kreimer he would be entitled to a jury trial; and unless the record shows that he waived a jury trial, it would be error to proceed to try him without the intervention of a jury.

The record in this case consists only of the affidavit, the warrant, the entry of continuance and the judgment entry above set out. There is no bill of exceptions, and we have no knowledge of what evidence was adduced on the trial before the municipal court.

Kreimer prosecuted error to the common pleas court, which affirmed the municipal court, and he is now in this court claiming error on the part of the municipal court and the common pleas court, and asking for a reversal of both judgments. He claims that, under Sec. 54 of the Greenlund act, 103 O. L. 239:

"At all trials for offenses under laws or ordinances regulating the sales or traffic in intoxicating liquors the court shall \* \* \* before the trial take testimony to determine whether or not the defendant is a licensee \* \* \* and if it appears that such defendant is a licensee whether such licensee has in fact been convicted of a previous offense under said laws or ordinances; and if the fact be that said licensee has suffered a previous conviction under any of said laws or ordinances, or that a conviction in the case pending will work a revocation of a liquor license granted in this state, the said licensee \* \* \* shall be entitled to a trial by jury."

Now it is contended by counsel for Kreimer, plaintiff in error, that the record fails to show—as it does—that an examination was made by the judge of the municipal court in Kreimer's case to determine whether or not he had suffered a previous conviction for a violation of the liquor laws, and that by reason

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of the failure of the record to disclose such an examination the municipal court had no jurisdiction to hear and determine the case and impose the penalty upon Kreimer.

There is no presumption of error in the trial of a case, and in order to warrant a reviewing court in reversing a case for error the error must be apparent in the record and prejudicial to the party complaining. The record in this case discloses that Kreimer's was a first offense. The affidavit shows it to be a first offense, and the judgment and finding also disclose the case to be a first offense. We have no record of what transpired before the judge of the municipal court as to the examination of Kreimer before the trial, nor of the testimony that was taken on the trial. For all that appears on the record the judge of the municipal court may have examined Kreimer and other witnesses before the trial and found that the charge made against Kreimer was a first offense. We can not assume that it was the second offense, especially in the face of the record which discloses it to be a first offense.

Judgments of the court are presumed to be regular and valid until they are shown to be irregular or invalid. The municipal court had jurisdiction to try Kreimer, in case it was a first offense, assuming that he was a licensee; but where the record fails to show that he was a licensee, as it does in this case, and where it fails to show that the court omitted to take testimony as to whether or not it was a first offense, no error appears affirmatively in the record that would warrant a reversal of the case.

If the plaintiff in error desired to protect himself in case the offense charged was a second one, it was incumbent upon him to have the record in the municipal court brought into this court so that we might be apprised of the proceedings in that court; and if that record should disclose that it was a second offense and the court proceeded to try him, as it did, without the intervention of a jury, then manifestly the judgment would be erroneous and would call for a reversal.

The record therefore fails to show any error prejudicial to

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the plaintiff in error which would warrant a reversal of the judgment.

Some question was made in the argument of the case as to whether or not the defendant had paid his fine and costs, and it was suggested that the case before this court was only a moot case because of the fact that plaintiff in error could not complain inasmuch as the judgment of the trial court had been satisfied by the payment of the fine and costs. It is sufficient to say that the record fails to show that the fine was paid by Kreimer and therefore the question is not presented as to whether or not a person who has been convicted of a misdemeanor and has paid his fine, may prosecute error to reverse the judgment.

The judgments of the municipal court and of the common pleas court are affirmed.

Jones and Jones, JJ., concur.

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**PRINCIPAL AND SURETY—SET-OFF.**

[Hamilton (1st) Court of Appeals, March 8, 1915.]

Richards, Chittenden and Kinkade, JJ.

(Sitting by designation.)

CHARLES L. EVANS V. LOU BEDDINGER ET AL.

**Surety on Replevin Bond Entitled to Benefit of Judgment Obtained by Principal Against Defendant In Damages for Breach of Contract.**

A surety on a replevin bond is entitled to the benefit of any valid judgment obtained by his principal against the defendant in an action for damages on account of breach of contract with reference to the same property involved in the replevin suit, and the issue of execution against the surety should be stayed until such right of set-off has been determined.

**ERROR.**

*Cobb, Howard & Bailey* and *H. L. Rockel*, for plaintiff in error.

*Dolle, Taylor & O'Donnell*, for defendant.

**CHITTENDEN, J.**

The facts, so far as they need be stated in this opinion, are as follows: On or about February 17, 1911, Elmer Stevie and

*Evans v. Beddinger.*

Lou Beddinger entered into an agreement whereby Stevie was to exchange his automobile with Beddinger for a motor launch and was to pay Beddinger \$150 in cash. The automobile was delivered to Beddinger and Stevie paid him \$139.20. After more than a year had elapsed and Beddinger had failed to deliver the motor boat to Stevie, Stevie brought an action in replevin to recover possession of the automobile. The plaintiff in error, Charles L. Evans, became surety on the replevin bond given in that action. On trial in the common pleas court a verdict was rendered in favor of Beddinger and the jury having assessed the value of the automobile at \$150, Beddinger elected to take the amount of the judgment in lieu of the automobile, and thereupon judgment was entered in favor of Beddinger against Stevie for \$150. Execution was issued upon this judgment and returned unsatisfied. Evans was then cited to show cause why the judgment rendered against his principal should not be enforced against him. He appeared in response to such citation and filed his answer, in which answer he set out in substance the facts concerning the trade between Stevie and Beddinger, and that his principal, Stevie, had begun an action in the common pleas court of Hamilton county against Beddinger to recover damages in the sum of \$450, alleged to have been suffered by him by reason of a breach of the contract of trade above referred to. He further alleged the insolvency of the defendant Beddinger, and asked that no further proceedings be taken against him during the pendency of the action by Stevie against Beddinger until after judgment should have been entered therein in favor of Stevie, and that then such judgment should be set-off against the judgment of Beddinger, and that after such set-off he be discharged from further liability on the bond. To this answer a demurrer was filed which was sustained by the court, and no further pleading being filed by Evans judgment was entered against him in the sum of \$150. Error is prosecuted in this court by Evans. He insists that the common pleas court erred in sustaining the demurrer and entering judgment against him.

We have considered the oral arguments of counsel and

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have examined the briefs, and upon consideration of the question involved, we conclude that Evans is entitled to the benefit of having set off against the judgment entered against him and his principal, Stevie, any valid judgment obtained by Stevie against Beddinger. At the time the matter was presented to the trial court on the demurrer, no judgment had been rendered. The allegations were simply that the action was pending, and we think that the trial court was justified in declining to stay the entering of judgment until after the case brought by Stevie against Beddinger had been determined. No existing defense was shown by Evans that would necessarily preclude the entering of judgment against him upon the summary proceedings that were instituted to accomplish that purpose; but it is clear that, in view of the allegations of the insolvency of Beddinger, and the fact that Beddinger had been unable to satisfy his judgment upon execution against Stevie, Evans was entitled to be protected against the collection of the judgment from him until such time as it should be determined that no valid set-off could be obtained in the form of a judgment in favor of Stevie in the pending suit. Therefore, we think, that while the trial court did not err in sustaining the demurrer, it should have stayed the issuing of execution upon such judgment until the right of set-off could be determined in the then pending case of Stevie against Beddinger. It was stated by counsel in oral argument in this court, and not disputed, that a verdict by direction of the court was recently rendered in favor of Stevie for \$150 in that case.

Under the statutory power conferred upon this court to modify judgments, we will so modify the judgment of the common pleas court as to stay the issuing of execution upon the judgment until after the final determination of the action set out in the answer of Evans. The judgment as so modified will be affirmed.

**Richards and Kinkade, JJ., concur.**



Iron Co. v. Miller.

### PRINCIPAL AND AGENT.

[Cuyahoga (8th) Circuit Court, June 26, 1905.]

Marvin, Winch and Henry, JJ.

\*SALEM IRON CO. v. LEONARD B. MILLER.

Agent is Liable in Damages to Principal for Fraud and Failure to Defend Suits.

An agent who enters into a contract on behalf of his principal with another company for whom he is sales agent for merchandise at an exorbitant price and in unreasonable quantities, and who fails to defend an action instituted against his principal in another jurisdiction, and by false testimony in that action aids the selling company to obtain a judgment against the principal, is guilty of fraud for which his principal upon the discovery thereof may maintain an action against him for damages.

ERROR.

*Biltingley & Clarke and Kline, Tolles & Goff*, for plaintiff in error.

*Goulder, Holding & Masten* for defendant in error.

HENRY, J.

This proceeding in error is prosecuted to reverse the judgment on the pleadings, rendered by the court of common pleas, in favor of defendant below. The parties here stand in the same relation as they stood there.

The petition alleges that Miller while secretary of the Salem Iron Company, and while he was also a member of the firm that were sales agents for the Lake Superior Consolidated Iron Mines, acted as agent for both parties in negotiating the sale of iron ore by the latter to the former company at an exorbitant price, and in a quantity far beyond the needs of the Salem Iron Company.

It further sets out that when this came to the knowledge of the board of directors of the Salem Iron Company they repudiated the contract as unauthorized and void. The mining company thereupon brought an action against the Salem Iron Company in the federal court in Pennsylvania. The latter company then called upon Miller to defend that action, which

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\*Reversed, no op., Salem Iron Co. v. Miller, 76 O. S. 586.

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he failed to do, but instead, as is claimed, assisted the mining company with false testimony and otherwise, so that it prevailed. This action was thereupon begun by the Salem Iron Company against Miller to recover the amount of the judgment which it paid in the former action.

The answer here denies the fraud, admits the other essential facts, and alleges that the Pennsylvania case was tried and determined upon the issues whether the contract between the two companies was authorized or ratified by the Salem Iron Company. No reply was filed to his answer.

It is manifest that this is not a case of an agent binding his principal by a contract apparently within, but really without, the agent's authority. In such a case the agent might be liable over. Here Miller was admittedly agent for both parties, so that his real and apparent authority were equal. If he did not have authority from the Salem Iron Company to enter into this contract, then the former action must have been determined as it was, because of a subsequent ratification of the contract by that company. And that being true, it follows that whether Miller did or did not have authority this action seeks to hold him responsible, not for his own act merely, in contracting on behalf of the Salem Iron company, but for an act which that company either antecedently or subsequently made its own. This it can not do.

It is clearly bound by the adjudication in the former case, even though Miller was not a party thereto. See *Atkinson v. White*, 60 Me. 396.

But it is claimed that Miller fraudulently obtained an unjust adjudication of that issue by his own false testimony, and therefore this action can be maintained upon that ground alone. We do not concur in this view. The clear weight of authority is that perjury and subornation under such circumstances are not actionable civilly. See 3 *Enc. Pl. & Pr.* 630, and cases there cited. Also, *Taylor v. Bidwell*, 65 Cal. 489 [4 Pac. Rep. 491]. To hold otherwise would be to foster endless litigation over the same subject-matter.

The judgment below is affirmed.

Marvin and Winch, JJ., concur.

Coal Co. v. Quirk.

### CONTRACTS—SALES.

[Cuyahoga (8th) Circuit Court, June 11, 1907.]

Marvin, Winch and Henry, JJ.

INDEPENDENT COAL CO. v. C. N. QUIRK, ET AL.

**Sale of Output of Coal without Agreement to Deliver Entire Output  
Held Unenforceable.**

When one agrees to purchase the entire output of another's plant and pay for it at a certain price, but there is no agreement on the part of the seller to deliver his entire output, upon a suit for the price of goods delivered under this contract; Held: That defendant has no counterclaim for damages by reason of plaintiff's failure to send him his entire output as there was no enforceable contract.

ERROR.

*Kerruish & Kerruish* for plaintiff in error.

*Hamilton & Smith*, for defendants in error.

**HENRY, J.**

The defendant in error recovered a judgment against the plaintiff in error for coal sold and delivered under the following contract:

"C. N. Quirk, Pres., P. F. Walthour, Vice-Pres. and Gen'l  
Mgr., H. F. Thrasher, Sec. and Treas.

"NORTHERN OHIO COAL AND COKE SUPPLY COMPANY.

"Superior Gas and Steam Coal a Specialty.

"Reference.

General Office.

"First National Bank.

"CHARDON, OHIO, Aug. 9th, 190-.

"Contract for Coal.

"Agreement between the Independent Coal Company of Cleveland, Ohio, by P. P. Quail, its manager, party of the first part and Northern Ohio Coal and Coke Company, by H. J. Thrasher, Secretary, party of the second part; Witnesseth:-- Said party of the first part agrees to take all surplus coal of said party of the second part in the amount of all that said party can ship outside of local trade.

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"The price of these deliveries is to be 97 1-2 cents, per ton f.o.b. mine until September 1st, 1902, and \$1.00 per ton f.o.b. mine from September 1st, 1902, until January 1st, 1903. The grade of coal to be run of mine from the Chicera mine of the Chicera Coal and Coke Company of Chicera, Penn. If rate of freight changes higher the Independent Coal Company have right to cancel this contract.

"(Signed) THE INDEPENDENT COAL COMPANY,

"By P. P. QUAIL,

"Manager.

"NORTHERN OHIO COAL & COKE SUPPLY CO.,

"By H. J. THRASHER,

"Secretary & Treasurer."

The plaintiff in error was defendant below and interposed a counterclaim upon the alleged failure of the defendants in error to carry out their part of the contract. Its answer alleges that when the price of coal went up, the plaintiff below failed and refused to deliver all of its surplus coal not required for the local trade, by reason of which plaintiff in error was compelled to and did buy certain large amounts of coal needed by it, and to pay a price in excess of that named in the contract. It, therefore, asks damages for the difference.

This case has been here before with the parties standing in the same relation as they stand now. At that time we reversed the judgment of the court below for misconduct of the jury. Our attention was not then challenged to the fact that under the pleadings and written contract there was no question for the jury to decide. Had our attention been so challenged we should have been obliged to say this contract is entirely one sided and does not require the defendants in error to deliver any coal whatever. Compare *Herrick v. Wardwell* 58 Ohio St. 294 [50 N. E. Rep. 903]. Its effect is to bind the plaintiff in error to pay for any coal that may have been delivered to and accepted by it in pursuance of this contract. This result was reached by the court below, though not upon the same ground.

The judgment is affirmed.

Marvin and Winch, JJ., concur.

**Light & Power Co. v. State.****CONTRACTS—COUNTIES.**

[Perry (5th) Court of Appeals, June 30, 1914.]

Shields, Powell and Voorhees, JJ.

**OHIO LIGHT & P. CO. ET AL. V. STATE EX REL. PROSECUTING ATTORNEY OF PERRY COUNTY.**

**Without Authority to Contract for Lighting County Buildings Without First Advertising for Bids.**

A contract entered into between county commissioners and a public lighting company for the lighting of county buildings for a definite period is invalid and will be canceled where made without first advertising for bids, notwithstanding no company other than the one with which the contract was made was engaged in furnishing light for public or private consumers in that locality or had the right to use the streets for that purpose, and the contract entered into without advertising was entered into in good faith, and the prices therein specified for lighting are reasonable, and the expense of advertising for bids has been saved.

*T. B. Williams*, for plaintiff in error.

*T. M. Potter*, Pros. Atty., for defendant in error.

**BY THE COURT.**

This action was commenced in the court of common pleas of this county by the defendant in error, who sought to cancel and set aside three certain contracts that had been entered into between the Ohio Light & Power Company and the other plaintiffs named, who are the commissioners of Perry county, Ohio, for the furnishing of electric light by said power company for the use of Perry county in the lighting of its jail, infirmary and the children's home buildings which belong to the county. The principal ground upon which it was sought to set aside the contracts was that the same had been entered into between the light and power company and the commissioners of said county without advertising for bids and in violation of the statutes of Ohio with relation to contracts entered into by county commissioners. The particular section of the statute that is claimed to have been infringed in Sec. 2435-1, and which reads as follows:

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"The commissioners of any county may at any time either before or after the completion of any county building, invite bids and award contracts for supplying such building with light, heat and power, or any of the same, for any period of time, not exceeding ten years, but none of the provisions of Sec. 5660 of the G. C. shall apply to any such contracts."

The latter clause of the statute quoted relates solely to the certificate required by law to be filed by the clerk or auditor before a contract for the expenditure of money can be entered into, certifying that the money to carry out such contract is in the treasury, or levied and in course of collection, and does not have any bearing upon the case presented. The pleadings show that a contract was entered into between the parties, plaintiff in error, the Ohio Light & Power Company, on the one hand, and the commissioners of Perry county, on the other hand, by which the Ohio Light & Power Company were to supply the light for the buildings named for a period of five years, at a price agreed upon, with the option to continue for five years longer.

It is contended by the prosecuting attorney that by the terms of this statute, the commissioners were required to submit its proposals for light at competitive bidding, which was not done, and that submission is a condition precedent to the right of the commissioners to enter into any contract for the purpose of supplying light to those buildings, and that because it had been omitted, the contracts themselves were void and should be canceled and set aside.

The defendant, the Ohio Light & Power Company, set out for a defense, in substance, that at the time of entering into each of said contracts, which it admits were made, there was no other firm, person or corporation, except the answering defendant, in said township where the buildings were located, or in the village of New Lexington, furnishing light to public or private consumers, nor was there any other person, firm or corporation, except the answering defendant, at the time of the entering into of said contracts, or since, that had the right to the use of the streets, alleys and public places within the said village of New Lexington, Ohio, for the purpose of transporting and conducting electric current in said village.

**Light & Power Co. v. State.**

It is further said as a part of its said second defense, that it is the only person, firm or corporation furnishing light to public or private consumers in Perry county, Ohio, except a small plant at Junction City, about five miles from the public buildings of Perry county, Ohio, for the lighting of which the contract was made; and further, that there was no other person, firm or corporation, in said county, village or township aforesaid, that could have bid on the lighting of said public buildings, except this answering defendant, in case said county commissioners had advertised for bids for all of said buildings. Further, that said contracts were made in good faith, and the prices therein specified for the lighting of said buildings were and are reasonable. For the reasons given, it alleges that the advertising for bids by the county commissioners was unnecessary and that by omitting said advertising there was a saving of expense to the taxpayers, as there could have been no competition whatever in case advertising was had.

A demurrer was filed to the said second defense.

The question presented is rather a new one in the state of Ohio. It is a general principal that all contracts relating to public affairs and involving annually a large amount of money must be let at public bid, and a majority of the court have arrived at the conclusion that this demurrer is well taken; that the second defense as set out and alleged, does not state a defense to the cause of action contained in the petition, and that the contracts entered into between the Ohio Light & Power Company and the commissioners of Perry county, having been let without notice or inviting bids from any other source, are void, and that the action of the court of common pleas in cancelling and setting aside such contracts was not erroneous, and that the judgment of that court should be affirmed. The cause will be remanded to the court of common pleas for execution, and exceptions may be noted.

**Shields, Powell and Houck, JJ., concur.**

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### INJUNCTION—NUISANCE.

[Hamilton (1st) Court of Appeals, April 1, 1916.]

Jones, Jones and Gorman, JJ.

UNION REDUCTION CO. v. JOHN STOREY.

**Injunction Lies Against Operation of a Plant Throwing off Noisome Odors.**

A reviewing court will not disturb an order enjoining a reduction plant from casting off noisome or offensive odors, where it is in evidence that such odors have been emitted to the annoyance of persons living nearly half a mile distant, and experts have testified without contradiction that with a plant properly equipped the emission of such odors could only be due to carelessness or accident.

*Peck, Shaffer & Peck and Healy, Ferris & McAvoy*, for plaintiff in error.

*Kelley & Remke*, for defendant in error.

**JONES, (E. H.) P. J.**

In the court below John Storey asked for an injunction against the Union Reduction Company restraining it from casting upon his premises and into his dwelling-house noisome smells, gases, odors, etc. arising from its garbage and dead animal crematory or reduction plant.

A permanent injunction was granted in this language:

"It is therefore ordered, adjudged and decreed by the court that an injunction be, and the same is hereby granted, restraining the defendant from operating its reduction plant so as to continuously create or cause to be cast upon the land of the plaintiff described in the petition any noisome or offensive odors, vapors or gases, or into or about the dwelling of plaintiff to the serious injury of plaintiff in health, comfort or property from and after the date of the entry of this decree."

The company seeks here a reversal of this judgment.

There was a large number of witnesses called upon either side and, needless to say, the testimony is conflicting. There is a preponderance, however, in support of the finding of the court that "at certain times a nuisance is created by the way in which the defendant's reduction plant is operated."



## Reduction Co. v. Storey.

The reduction company has a contract with the city of Cincinnati requiring it to gather and dispose of by cremation and reduction process the garbage, dead animals and animal offal of the city. This work by law devolves upon the city but there is statutory authority for the contract made with the plaintiff in error by the city, Sec. 3809 G. C.

It is claimed that the plant has the sanction of the legislature and city council, that it is performing a public function that has to do with and is closely related to the health and general welfare of the people of Cincinnati and that for these reasons an injunction will not lie. The authorities to which we are cited support this claim but provide that the work must be done with a high degree of care and with constant vigilance by those in charge to see to it that only the latest and most improved machinery and appliances are employed.

The evidence shows without contradiction that this plant at the time of the final hearing, in its plan and equipment, was fully up to date. Mr. Jesse Moorman, president of the company, and Mr. Charles E. Woodworth, a man of many years' experience and an expert upon the subject, were called by defendant below and testified as to the character of the plant.

Mr. Moorman testified that:

"The plant at our last trial was in an uncompleted condition. Since then we have completed all the buildings, we have put new conveyors in the entire plant, we have added four more units to the digestors, we have completed the decreasing plant, and installed one new drier and a scrubber."

"Since the last trial we have rebuilt this plant. In that time we have added—well, we have put in a complete new conveyor system from start to finish. A portion of this decreasing plant was installed at that time, and one boiler, and one drier, and four units of digestors, and the scrubber we have put in since that time."

He also testified that he was in the garbage and reduction business at the same time in Indianapolis and at St. Louis, and was familiar with other plants in the United States.

"Q. Do you know of any mechanism for the distribution of

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gases, or elimination of odors, not in operation in this plant by yourself? A. I do not.

"Q. What are the odors coming from the plant now, Mr. Moorman, what causes them? A. What odors do you mean?

"Q. I mean the odors that emanate from that plant; you get odors from the plant, do you not? A. You don't get odors from the plant unless you go on our premises and get close to the plant.

"Q. You say there are no odors that carry from the plant? A. No, not to amount to anything, no, sir.

"Q. You think, so far as you know, there are no carrying odors from that plant today? A. I think not.

Mr. Woodworth testified as follows:

"Q. I will ask you to state whether there is any device or mechanism in use anywhere for the elimination of odors and the destruction of the two smelling gases that has not been introduced at this plant, any successful device? A. I know of none.

"Q. I wish you would state to the court whether there is anything in the plan of operations, or in the mechanism to be used which can be added to this plant to further eliminate the odors? A. I know of nothing, comparing them with other plants of similar character in the country.

"Q. What difference is there in the carrying of the odors now and a year ago? A. Well, with the device they have introduced they have mitigated the carrying of the noxious and offensive gases and odors to the extent of introducing an appliance that is accepted by all the garbage concerns in this country as being the most practical for this purpose.

"Q. Do you know of any plant that is superior to this equipment, to this plant, for the handling of the same tankage tonnage? A. Know of no plant, to my knowledge, sir.

"Q. With the introduction of the new apparatus, you say it will eliminate all the far carrying odors? A. Yes, sir, except under extraordinary conditions.

"Q. Except when there would be carelessness of the employes, valves getting out of order or the pipes bursting? A. Yes.

"Q. About how far away from that plant would you say the local odors that are peculiar to the plant, would be discerned?

**Reduction Co. v. Storey.**

A. Well, according to the direction of the wind, sir. If you were in the teeth of the wind, that might carry two or three blocks, and if you were against the wind you wouldn't know the plant was there.

"Q. Well, now, if you were to be told that during the past five or six months as often as once or twice a week, the people experienced the most disagreeable odors and that of burning flesh and garbage, at a distance from half a mile to a mile and a quarter, to what would you attribute that? A. Two or three times a week? If such were an established fact, I would think there was carelessness that often.

"Q. If you were to be told people in their homes a distance of from half a mile to a mile and a half were frequently unable during the past five or six months to eat their meals in comfort because of this sickening odor, what would you say that odor came from? A. I couldn't tell of any other source, of an odor of that type, so far carrying, that would come from any other part of that process except what I told you, from gas that came from the digester that was allowed to escape through some cause, either negligence or an accident."

We thus have proof from the company's witnesses that, except through carelessness or accident, there could be no appreciable annoyance to Mr. Storey who lives nearly half a mile from the plant.

We can not see, therefore, how the plaintiff in error can justly complain of the restraining order granted by the court below. If its own expert witnesses are correct (and their evidence is not denied or controverted), there is no excuse in law or morals for offensive odors reaching Mr. Storey's home twenty-three hundred feet away. It seems to us that the order granted below restraining the defendant company from operating its reduction plant so as to continuously annoy Storey in his said home with noisome or offensive odors, vapors or gases is reasonable and proper, and one from which there can be no relief in a reviewing court.

Judgment affirmed.

**Jones, O. B. and Gorman, JJ., concur.**

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**MUNICIPAL CORPORATIONS.**

[Cuyahoga (8th) Circuit Court, June 8, 1908.]

Marvin, Winch and Henry, JJ.

**HENRY SOEDER V. CLEVELAND (CITY).****Compliance with Burns Law must be Pleaded to Recover against Municipality.**

In an action against a municipal corporation to recover on a contract with it to which the Burns law applies, the petition must allege and the evidence show that the requirements of said law were complied with and a certificate filed showing money in the treasury to the credit of the proper fund.

[Syllabus by the court.]

**ERROR.***Blanding, Rice & Ginn*, for plaintiff in error.*Newton D. Baker*, for defendant in error.**WINCH, J.**

The petition in error in this case alleges that the common pleas court erred in sustaining a demurrer to the plaintiff's second amended petition. That petition for its first cause of action claims compensation for certain work done and materials furnished in the improvement of a city cemetery and under an alleged contract entered into in 1898, when the city of Cleveland was under the so-called Federal Plan law (88 O. L., 105), and William J. Akers was director of charities and corrections. The sixty-seventh section of said law provided that said director should have all the powers and perform all the duties which are by law or ordinance vested in or required of the trustees of cemeteries.

Chapter 7, Div. 8, Tit. 12, Part 1 R. S. (Secs. 4154 G. C. et seq.), then provided regarding cemeteries, vesting their title in the corporation, but giving their entire management, control and regulation to a board of three trustees; to lay out such grounds and cemeteries into lots, avenues, etc., direct all improvements and embellishments of the grounds, determine the size and price

## Soeder v. Cleveland.

of lots and sell the same, charging therefor no more than might be necessary to reimburse the corporation for the cost of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds.

The money thus received, the cemetery trustees were authorized to spend.

The demurrer was sustained because of failure of the pleader to allege that the Burns law, so-called (Sec. 2702 R. S.; Sec. 3806 G. C.), which requires that no contract (involving over \$250 under the Cleveland special act) shall be entered into by the corporation unless the city auditor "shall first certify that the money required for 'that purpose' is in the treasury to the credit of the fund from which it is drawn," etc.

The contention of the plaintiff in error is, first, that it does not affirmatively appear from the petition that the Burns law was not complied with, and secondly, that the Cleveland special act being unconstitutional, its director of charities and corrections was but a *de facto* board of cemetery trustees and as such not subject to the provisions of the Burns law.

The first point is one of pleading.

It is alleged in the petition that "on said 14th day of April, 1898, the said city of Cleveland, acting through said William J. Akers, as such director of charities and corrections, the said Akers therein exercising the powers of the board of trustees of cemeteries, duly entered into a contract in writing with one Conrad J. Hoffman, a copy of which is hereto attached, marked 'Exhibit A,' for the improvement of said West Park Cemetery."

It is said that the word "duly" intended that the Burns law, as well as all other laws, was complied with. We can not so conclude, for the petition states specifically through whom the city was acting in making the contract, and limits it to the director named, thus excluding the participation therein of the city auditor, as required by the Burns law.

Again, all contracts with a municipal corporation being void, except such as come within the requirements of the Burns law, we are inclined to the view expressed in the case of *Kerr v. Bellefontaine*, 7 Circ. Dec. 93 (13 R. 24), that in an action on a contract with a municipal corporation it is necessary "to allege

## Cuyahoga County Circuit.

and prove that at the time such contract was made, the necessary certificate of the clerk (auditor) showing that the money required for the same was in the treasury to the credit of the fund from which it was to be drawn, and not appropriated for any other purpose, was obtained." This point is also suggested but not decided by the case of *Lancaster v. Miller*, 58 Ohio St. 558 [51 N. E. Rep. 52], and the ruling of the circuit court referred to is not weakened by the fact that that case was reversed by *Kerr v. Bellefontaine*, 59 O. S., 446 [52 N. E. Rep. 1024], the reversal being put upon the ground that Sec. 2702 did not apply in the case at all.

Coming to the second point claimed by counsel for plaintiff in error, that Sec. 2702 does not apply to cemetery trustees and that Akers was acting as a *de facto* board of cemetery trustees, it is two-fold.

The claims that cemetery trustees are not bound by Sec. 2702 in making contracts for the city is based upon the case of *Kerr v. Bellefontaine*, *supra*, but that case applies only if the improvements here involved were to be paid for out of the receipts from sales of cemetery lots, and not if the payment for work done under the contract involved the raising of money by taxation, and there is nothing in the petition to show which was the case.

The presumption would be, from the vast amount of work to be done and the large sums to be expended under the contract, as set forth in the petition, that this was original work in a new cemetery, and within the purview of Sec. 2702. But, however that may be, we hold that Akers was a *de facto* director of charities and corrections, and not a *de facto* board of cemetery trustees, within the principles announced in the case of *State v. Gardner*, 54 Ohio St. 24 [42 N. E. Rep. 999; 31 L. R. A. 660].

We therefore hold that the demurrer to the first cause of action was properly sustained.

As to the other causes of action, they appear to be for extras, all growing out of the contract pledged in the first cause of action and inseparably connected with it. While each is for less than \$250 this effort to split up a single cause of action and thus

Soeder v. Cleveland.

circumvent the provisions of Sec. 2702 should not be encouraged and we therefore hold that the demurrer as to them was properly sustained.

Judgment affirmed.

**Marvin and Henry, JJ., concur.**

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### **EXECUTORS AND ADMINISTRATORS—WILLS.**

[Cuyahoga (8th) Circuit Court, February 3, 1908.]

Marvin, Winch and Henry, JJ.

**EDWARD N. FELL, ADMR. v. AMYRILLA CARTER, ADMRX.**

**Bequest Incompetent Evidence of Payment in Action for Services Rendered Decedent.**

In an action to recover for personal services rendered a deceased person, it is not competent to introduce the decedent's will, in which she makes a bequest to the plaintiff, as evidence tending to show that the bequest was in payment for the services, unless the will so states.

[Syllabus by the court.]

#### **WINCH, J.**

This was an action to recover for personal services rendered by defendant in error's intestate, Thomas Sheets, to plaintiff in error's decedent, Sarah A. Spafford.

Without objection the defendant below was permitted to introduce the fourth section of the will of Mrs. Spafford which provides:

"To my brother Thomas Sheets, I give, devise and bequeath the sum of four hundred dollars, but should he die before myself, this bequest will be null and void."

In his charge the trial judge directed the jury to consider whether this bequest in the will was intended to be and was in satisfaction of her brother's claim. Afterwards realizing that in this respect he had erred in his charge to the jury, the judge recalled the jury and gave the following additional charge:

"Gentlemen, I submitted an issue in the charge, which upon reflection I am satisfied was erroneous on my part. That was with reference to the use that might be made of the proof as to

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the bequest in the will of four hundred dollars by Mrs. Spafford to her brother. This money has never been received by him, and it can not bind his rights in any respect nor those of his administrator. It, therefore, can not be considered in the nature of a defense by way of any satisfaction for any claim which the plaintiff may have in the case. You may, however, consider that act of hers in making such bequest in the will, and give it whatever weight it is entitled to as bearing upon what the true understanding and agreement was between the parties as to any promise to pay for the services rendered by the plaintiff. If it has any bearing or sheds any light on that question, consider it for that purpose. It can not be considered as a defense in the nature of any satisfaction for any obligation sued on. I, therefore, make this correction that there may be no error in the instructions given in the charge."

This additional charge is not in accord with the proposition laid down in the case of *McNeil v. Pierce*, 73 Ohio St. 7 [75 N. E. Rep. 938; 1 L. R. A. (N. S.) 1117; 112 Am. St. Rep. 695], but its general tenor was favorable to the defendant below and can not be complained of by him. However, his counsel now says that the statement therein contained that "this money has never been received by him," was not based upon any evidence in the case, and was therefore unwarranted and was misleading. For this reason he says that the judgment should be reversed.

This language was doubtless suggested by the language used by Judge Wright in ruling upon a similar proposition in the case of *Willis v. Dun*, Wright 133, but whether a good or bad reason was given for excluding the will in that case, or limiting its competency in this case, is immaterial. The will should not have been submitted to the jury at all, or for any purpose. There was no error prejudicial to plaintiff in error in this additional charge. Neither was there error in permitting the deposition of a son of Thomas Sheets to be used. He was not disqualified from testifying by any statute we know of.

Judgment affirmed.

**Marvin and Henry, JJ., concur.**



Transportation Co. v. Pearson.

### ADMIRALTY—NEGLIGENCE.

[Cuyahoga (8th) Circuit Court, June 8, 1908.]

Marvin, Winch and Henry, JJ.

\*GILCHRIST TRANSP. CO. v. GEORGE PEARSON.

**Negligence for Captain without Warning to Order Cable Hauled In.**

It is negligence on the part of the captain of a steamboat to order a cable hauled in, which is lying slack on the dock, without warning and without looking to see if anybody lawfully on the dock might be caught in a bight of the cable and injured.

[Syllabus by the court.]

ERROR.

*Seaton & Paine*, for plaintiff in error.

*R. B. & A. G. Newcomb*, and — *Skiles*, for defendant in error.

**WINCH, J.**

The defendant in error was a ship carpenter in the employ of the American Ship-Building Company, working on its docks on the old river bed, in the city of Cleveland. To these docks the *Neshoto*, a large steamer belonging to plaintiff in error, had been brought for repairs, and while Pearson was eating his lunch in one of the ship-building company's buildings on September 13, 1905, the *Neshoto* was moved across the river bed from the north bed from the north to the south side, and he found it there, apparently moored at the dock, when he came back to work. Walking along the dock to his work on the boat, just as he was about to step over a steel cable lying slack upon the dock and extending from the boat to a port on the deck, said cable was suddenly, and without warning, drawn taut by a steam capstan on the boat, caught him between the bight and threw him into the air, as a result of which he fell upon the dock and sustained serious injuries. Pearson sued the transportation company for damages, claiming it was negligent in starting the steam capstan on the deck of the boat and jerking the cable when

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\*Affirmed, no op. *Gilchrist Transp. Co. v. Pearson*, 80 O. S. 723.  
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it knew, or should have known, that said cable was lying upon the dock and that said dock was a passageway for the men employed in the shipyard, and that it would catch and injure plaintiff if it were suddenly jerked, and in failing to warn the plaintiff as said capstan was about to be started and said cable about to be jerked, well knowing that the men upon the dock relied upon and had a right to rely upon a warning notice being given in such event.

The answer was a general denial and plea of contributory negligence on the plaintiff's part.

On the trial the transportation company claimed that at the time of the accident the *Neshoto* was under the control and in the care of the ship-building company and that the latter was responsible for the accident, if anybody. This issue was fairly submitted to the jury and we think that the evidence, without giving the details of it, warranted the jury in determining that the transportation company did the act which resulted in the injury to Pearson.

We also think that the transportation company was negligent under the circumstances. Warning should have been given before the line was hauled taut.

It is just as negligent to haul in such a cable quickly, without warning, and without looking to see if anybody on the dock might get caught, as it is to throw out a line without warning and without looking to see if anybody on the dock might be hit by it and injured. If the captain of the *Neshoto* desired to use the dock for his own purposes, he should have taken ordinary steps for the safety of those on the dock.

Pearson had a right on the dock.

The evidence as to the custom at said dock of giving warning under such circumstances was properly received on the question of Pearson's possible contributory negligence, and the jury was warranted in finding him without fault.

Further consideration of the evidence in this case is unnecessary; it is sufficient to say that we think it sustains the verdict and the judgment is affirmed

**Marvin and Henry, JJ., concur.**

Stetson v. Vesper.

**BANKRUPTCY—GAMING AND GAMBLING.**

[Cuyahoga (8th) Circuit Court, September 23, 1908.]

Marvin, Winch and Henry, JJ.

F. A. STETSON, TR. v. DAVID VESPER ET AL.

**Recovery of Money Lost at Gambling by Trustee in Bankruptcy.**

A trustee in bankruptcy can maintain an action to recover money lost by his bankrupt within six months of the bringing of the action.

[Syllabus by the court.]

ERROR.

**WINCH, J.**

This action was brought in the common pleas court by F. A. Stetson, as trustee in bankruptcy of one A. S. Jacoby, to recover the sum of \$1,155 lost by said Jacoby in gambling with the defendants, Vesper and A. E. Harden, the latter being also the owner of the building in which the gambling was done.

Provision for suits of this kind is made by Secs. 4269 to 4276 R. S. (Secs. 5966 G. C. et seq.). Section 4270 provides that a person losing money in gambling may recover it back, if he sues therefor within six months after the loss of the money. Section 4773m provides that if the loser does not bring such suit within six months, another person may bring it for his own benefit thereafter.

In this case it appears from the petition that the trustee in bankruptcy was appointed and the suit was brought by him within the six months, and for that reason the demurrer to the petition was sustained, on the theory that the right created by the statute which did not exist at common law, could only be exercised by the loser personally during the six months, and did not pass to his trustee in bankruptcy.

A correct solution of the question thus submitted requires an examination of the bankruptcy act, in order that we may determine what passes under it from the bankrupt to his trustee. Section 70 of said act reads, in part, as follows:

“The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall

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have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, except in so far as it is to property which is exempt. \* \* \*

“(3) Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; \* \* \*

“(6) Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.”

Elucidating the meaning of the words used in Section 70, by referring to the adjudicated cases upon the subject, we find that Loveland, in his text-book on bankruptcy, Section 176, at the bottom of page 509 says:

“Thus, the trustee is the proper party to institute a suit to recover the value of lands or goods and merchandise sold by the bankrupt,” etc.

So, also, the trustee, where a right of action exists under the state or federal law, may recover money lost in gambling, and note 13 cites four cases as sustaining this proposition of the text.

We are unable to find any of said cases in the library, but have no doubt that they do sustain the proposition that the trustee succeeds fully to the right of the bankrupt to recover money lost in gambling, whether it be considered as a power conferred upon him by the statute or a right of action arising, through the unlawful taking of his money. It thus appears, as we think, that the right to bring this action passed out of the bankrupt within the six months, so that he could not exercise it during that time, and that it passed to his trustee in bankruptcy, who was the only person during the remainder of said six months entitled to bring the action. Such being the case the demurrer to the petition should have been overruled, and for error in sustaining it, the judgment is reversed, and proceeding to render the judgment which should have been rendered, the demurrer to the petition is overruled, and the cause is remanded to the common pleas court for further proceedings.

**Marvin and Henry, JJ., concur.**

Trumble v. Colgan.

### INTOXICATION.

[Cuyahoga (8th) Circuit Court, September 23, 1908.]

Marvin, Winch and Henry, JJ.

MARGARET TRUMBLE v. C. W. COLGAN.

**Evidence that Husband was Drunk in Saloon not Sufficient in Action by Wife for Sale of Liquor to Husband.**

The fact that a husband was found drunk in a saloon, after the wife had notified the saloonkeeper to cease selling him liquor, is not sufficient in itself, the husband, as a witness for plaintiff testifying that he did not get his liquor there, to show that the defendant saloonkeeper sold him the liquor which made him drunk.

[Syllabus by the court.]

#### WINCH, J.

Plaintiff brought suit against Colgan, a saloon-keeper, for damages sustained by reason of the latter's selling intoxicating liquor to her husband, George W. Trumble, a person who was in the habit of becoming intoxicated, after she had notified him not to do so, as provided in the statute.

To sustain her case she offered herself and her husband as the only witnesses, and at the conclusion of their testimony a verdict for the defendant was directed.

We have read every word of the bill of exceptions to see if the plaintiff made out such a case that it should have been submitted to the jury.

She proved her husband an habitual drunkard, and that she had given the notice to Colgan that the law requires.

We think she utterly failed to prove that Colgan sold her husband any liquor after she had told him not to. The only evidence given by the wife on this subject was that she found her husband drunk in Colgan's saloon, about a month after the notice had been given. She also attempted to state that on the latter date she overheard Colgan say to her husband "We will fix her, George, you bet your life we will get even with her"; but this is weakened by her further testimony found on pages 25, 26, and 27 of the record.

The plaintiff offered her husband as a witness and thereby

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vouched for his truthfulness; he testified that Colgan never sold him a drink after notice.

Further it was said by the wife several times during her testimony that there were other witnesses who knew that her husband bought liquor in the defendant's saloon; the "boys," as she called them, and her own brother, or half-brother. It is significant that none of these witnesses were produced at the trial.

Having failed in a material point to make out a case, the trial judge very properly directed a verdict for the defendant; indeed, it was his duty so to do, and the judgment is affirmed.

**Marvin and Henry, JJ., concur.**

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**LANDLORD AND TENANT.**

[Cuyahoga (8th) Circuit Court, June 1, 1906.]

**Marvin, Winch and Henry, JJ.**

**H. R. CROW v. R. J. SIMMS.**

**Failure to Remove Small Part of Goods on Last Day of Lease not Holding Over.**

Where a tenant from month to month moves out on the last day of the month, but, through the fault of his movers, some of his goods remained in the house until the next morning, there is not such holding over as to constitute him a tenant for another month.

[Syllabus by the court.]

**ERROR.**

*W. W. Wheeler and Howland & Niman*, for plaintiff in error.  
*Klein & Harris*, for defendant in error.

**WINCH, J.**

When this action was begun before a justice of the peace, an attachment was issued on the ground that the claim sued upon was for necessities, to-wit, rent for a suite of rooms in an apartment house. On appeal to the common pleas court, the attachment was dissolved.

**Crow v. Simms.**

It appears that the tenant leased from month to month. Three days before the end of his month he notified the landlord that he would move out on the last day of the month. This he proceeded to do, and removed most of his goods before night-fall of the last day, but through the fault of his mover, some of his goods remained in the apartments until about 10 o'clock of the morning of the first day of the next month. The tenant and his family did not remain over the last night but slept elsewhere.

We hold that under the circumstances of this case there was not such a holding over as to constitute the defendant a tenant for another month. See cases cited in 18 Am. & Eng. Enc. of Law 406, n4. A consideration of both sides of this question may be found in *Haynes v. Aldrich*, 133 N. Y. 287 [31 N. E. Rep. 94; 28 Am. St. Rep. 636], and *Herter v. Mullen*, 159 N. Y. 28 [53 N. E. Rep. 700; 44 L. R. A. 703; 70 Am. St. Rep. 517].

There being no holding over, no claim for rent arose; hence no attachment as for necessities should have been allowed. The common pleas court properly dissolved the attachment and its judgment is affirmed.

**Marvin and Henry, JJ., concur.**

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**COVENANTS—PLEADING.**

[Cuyahoga (8th) Circuit Court, June 1, 1908.]

**Marvin, Winch and Henry, JJ.**

**JAMES R. BELL, TR. v. W. H. MAHAFFEY ET AL.**

**Bill of Particulars for Breach of Warranty to Pay Incumbrances cannot be Corrected on Error Showing Lack of Jurisdiction because Incumbrances were on "Real Estate."**

Where the bill of particulars filed before a justice of the peace recites that the claim is for "breach of warranty to pay incumbrances," and there is no bill of exceptions, showing that the warranty was as to incumbrances on real estate, it will be assumed that they were upon personal property and that the justice had jurisdiction of the case; and the record can

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not be helped out by allegations in the petition in error filed in the common pleas court seeking a reversal of the judgment of the justice on the ground that he did not have jurisdiction of the action.

[Syllabus by the court.]

## ERROR.

*Vernon H. Burke*, for plaintiff in error.

*Brady & Dowling*, for defendant in error.

## WINCH, J.

Plaintiff in error sued defendant in error before a justice of the peace for "breach of warranty to pay incumbrances" and had judgment. Defendant in error thereupon filed a petition in error in the common pleas court to reverse said judgment, alleging that the justice was without jurisdiction in the case because it drew in question the title to real estate.

There was no bill of exceptions filed with the petition in error, and, as the bill of particulars filed in the justice's court does not disclose whether the warranty sued upon was for the payment of incumbrances upon real or personal property, the only question now for consideration is whether the fact that it was with regard to real estate could be brought before the common pleas court by an allegation to that effect in the petition in error and the introduction of evidence in the common pleas court to sustain that allegation of the petition in error.

The common pleas court held that such allegation in the petition in error was proper, received evidence thereunder, and reversed the judgment of the justice of the peace. In this we think the common pleas court erred.

While it is true that Section 6709 R. S. (Sec. 12247 to 12249 G. C.), regulating proceedings in error from the common pleas court to the circuit court provides that the circuit court may reverse the common pleas court "for errors appearing upon the record," and Sec. 6708 (Sec. 12241 G. C.), regulating error to the common pleas court from a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior to the court of common pleas, omits the words quoted, still the Supreme Court has not deemed the omission of said words significant, for it held, in the case of *Roberts v.*



**Bell v. Mahaffey.**

*Roberts*, 61 Ohio St. 96 [55 N. E. Rep. 411], a case carried into the common pleas court by petition in error from the judgment of the probate court, that "Nothing can be added to or taken from a record by averment in a petition in error, and extrinsic facts pleaded in such a petition do not form any part of the record sought to be reversed."

Most assuredly this rule should have been adhered to by the common pleas court in the case at bar. There being no record of the evidence introduced before the justice of the peace, it is quite possible that he received evidence showing that the warranty was made in the sale of personal property and none tending to show that it was with regard to real estate. If he did, he committed no error in entertaining jurisdiction of the case and so should not be reversed because of other or stronger evidence produced for the first time before the reviewing court. In this respect a petition in error differs from a bill in equity, and because the common pleas court disregarded this distinction its judgment is reversed and the judgment of the justice of the peace is affirmed.

**Marvin and Henry, JJ., concur.**

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**APPEAL—ELECTIONS.**

[Cuyahoga (8th) Circuit Court, February 17, 1908.]

**Marvin, Winch and Henry, JJ.**

**CUYAHOGA CO. (DEP. STATE SUPVRS.) ET AL V. STATE EX REL  
CLARENCE N. GREEN.**

**1. Reviewing Courts Required to Determine Questions of Election Submitted.**

A proper interpretation of election laws is of so much importance to all citizens, that a reviewing court must answer questions with regard thereto, when submitted to it, notwithstanding an election may have settled the rights of individuals involved, before the judgment of the court of original jurisdiction can be reviewed.

**2. Error Will not Lie in Appealable Case After Appeal Perfected and Dismissed.**

Appeal to the circuit court having been properly perfected in an appealable case, and the appeal subsequently dismissed, error will not lie to the same original judgment.

[Syllabus by the court.]

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## ERROR.

*White, Johnson, McCaslin & Cannon*, for plaintiffs in error.  
*Higley & Maurer*, for defendant in error.

**WINCH, J.**

On October 26, 1907, the relator filed his petition in the common pleas court praying that a writ of mandamus be issued against plaintiffs in error requiring them to recover and file a certain nomination paper and to print the names of the nominees thereon upon the ballots to be voted at the election to be held November 5, 1907.

The petition alleges that the only reason the respondents rejected said nomination paper was because they had held it to be not in apparent conformity with the provisions of the statutes of Ohio, in that it did not contain the names and addresses of persons to the number of five or less as a committee who might fill vacancies caused by death or withdrawal.

To this petition a demurrer was interposed and overruled, whereupon the case was heard upon the petition and the evidence and a peremptory writ was awarded on November 1, 1907, four days before the election.

The transcript shows that the following proceedings were had in the matter after the election:

November 30, 1907. Appeal bond fixed and filed by defendants.

December 26, 1907. Mandate from the circuit court filed setting forth that said court had granted the motion of the relator to dismiss the appeal and that the appeal was dismissed at the cost of the respondents.

December 24, 1907. Petition in error filed in the circuit court.

It is this petition in error that we now have under consideration; it alleges that the common pleas court erred in overruling the demurrer to the petition, and that the common pleas court had no jurisdiction of the action.

We have no doubt that this contention is correct. The action of the deputy state supervisors and inspectors of elections in the matter here involved is made final by the statutes. Such

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has been the holding of the Supreme Court so many times that a mere reference to a few of its decisions is sufficient. *Chapman v. Miller*, 52 Ohio St. 166, 176 [39 N. E. Rep. 24]; *Randall v. State*, 64 Ohio St. 57 [59 N. E. Rep. 742]; *State v. Jones*, 74 Ohio St. 418 [78 N. E. Rep. 505].

There are other cases decided by the Supreme Court, but not reported in full, referred to in brief of counsel for plaintiffs in error, which are to the same effect.

But it is claimed by defendant in error that notwithstanding our conclusion as to the law, we can not now reverse the judgment complained of, and motion is made to dismiss the petition in error upon the following grounds:

1. That the relief prayed for in the petition and the order below appertained to the duties of the plaintiffs in error as deputy state supervisors of elections of Cuyahoga county in and about the election held November 5, 1907.

2. That the order of the court below complained of was not served upon any of the plaintiffs in error.

3. That the plaintiffs in error have heretofore elected to review the said proceedings below by way of appeal.

The first two grounds suggest that any order this court might make now would be a *brutum fulmen*; that naught remains but an academic question.

We do not think the point well taken. A proper interpretation of the election laws is of so much importance to all our citizens that the courts must answer questions with regard thereto when submitted to them, notwithstanding the fact that the rights of individuals are usually determined in such matters before the reviewing courts can pass upon them, by the holding of an election.

Such has been the practice of the Supreme Court.

In the case of *Randall v. State*, *supra*, involving matters pertaining to the election held November 6, 1900, petition in error was not filed in the Supreme Court until November 17, 1900, and on January 22, 1901, the Supreme Court reversed the judgment of the circuit court, sustained a demurrer to the petition and dismissed it.

The case of *Beacham v. State*, 64 Ohio St. 577, concerning

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the election held in November, 1900, reached the Supreme Court October 26, 1900, but was not decided until April 9, 1901, when the judgment of the circuit court was reversed and the petition dismissed on the authority of the Randall case.

The third reason alleged for a dismissal of the petition in error has given us much trouble.

The transcript does not disclose why the previous appeal of this case was dismissed in this court. Every intendment, however, is in favor of that judgment of dismissal, and if other ground of dismissal may be presumed, it can not be claimed that the dismissal was for want of jurisdiction, for the law is well settled that actions in mandamus are appealable. *Dutton v. Hanover*, 42 Ohio St. 215; *State v. Philbrick*, 69 Ohio St. 283 [69 N. E. Rep. 439].

We may, therefore, suppose that the appeal was dismissed because the appellants, defendants below, failed to prosecute their appeal, or because the circuit court after the election refused to try the case and make up a record, when its judgment, being an original judgment, would have no operation. This point distinguishes the trial of a case involving only an academic question from the review of the judgment of an inferior court on a question which has become academic since leaving the lower court. The latter judgment, if erroneous, should not be left to stand as a precedent. If, then, the appeal was not dismissed for want of jurisdiction, was that adjudication a bar to further review of the action of the common pleas court?

In other words, did the plaintiffs in error elect their remedy and have they had their day in court in such sense that they can not now be further heard?

It has been decided in this state that one can not have two proceedings in error based upon the same judgment. *Cincinnati, S. & C. Ry. v. Belt*, 36 Ohio St. 93.

It is also said by Judge Davis, in the case of *Irwin v. Lloyd*, 65 Ohio St. 55, 61 [61 N. E. Rep. 157], that there can not be a second appeal from the same judgment.

We consider the following cases to be authority for the proposition that error can not be predicated to a judgment from

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which an appeal has been properly taken. *Sale v. Pratt*, 36 Mass. (19 Pick.) 191; *Furman v. Motely*, 67 N. J. Law 174.

The appeal having been properly taken and the case being an appealable one, the whole body of the case is in the appellate court and there is nothing left in the lower court upon which to predicate error.

We have little reluctance in reaching the conclusion stated, for the judgment of this court in the appealed case can easily be reviewed by the Supreme Court and the academic question propounded answered by that court in that case, as well as in this case, if it sees fit to answer it.

The motion to dismiss the petition in error is granted.

**Marvin and Henry, JJ.**, concur.

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**ERROR—REFERENCE.**

[Cuyahoga (8th) Circuit Court. March 23, 1908.]

**Marvin, Winch and Henry, JJ.**

**WIDOWS & ORPHANS FUND V. GERMAN ROMAN CATHOLIC CENTRAL  
VEREIN ET AL.**

**1. Order of Reference Not Reviewable.**

An order referring a cause to a referee is not a final order reviewable on error.

**2. Error Lies but Once.**

There can not be more than one review on error of the same judgment. All grounds of error must be stated in one petition.

[Syllabus by the court.]

**ERROR.**

*M. P. Mooney*, for plaintiff in error.

*Francis J. Wing and Herman Preusser*, for defendants in error.

**WINCH, J.**

While that part of the order of the common pleas court, now complained of, re-referring the cause to a referee, appears to have been unnecessary, in the light of the real issues made by the pleadings and also appears to be in conflict with the former

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order of the same court made on April 5, 1907, yet we are without jurisdiction to reverse it, because such an order is not a final order, within the purview of Sec. 6707 R. S. (Secs. 12258 G. C.), reviewable on error by the circuit court under the provisions of Sec. 6709 R. S. (Sec. 12248 G. C.). The mere reference of a case determines no rights. It is not to be presumed that upon the coming in of a second report in this case, any erroneous order will be made, based upon it; and should there be, it will be time enough to complain of it after the final order is made.

Another cogent reason exists why this petition in error should be dismissed.

We have already entertained one petition in error from the same judgment, and determined it. There can not be more than one review on error. *Cincinnati, S. & C. Ry. v. Belt*, 36 Ohio St. 93.

It is immaterial that the former case in this court concerned only such part of the order as appointed a receiver, for it was the duty of the plaintiff in error in one case to point out all the errors by which he claimed to be prejudiced, and not base a separate petition in error upon each alleged ground of error.

The petition in error is dismissed.

**Marvin and Henry, JJ., concur.**

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**COURTS—JUSTICE OF THE PEACE.**

[Cuyahoga (8th) Circuit Court, May 18, 1908.]

Marvin, Winch and Henry, JJ.

JOSEPH M. CORRIGAN V. JOHN W. MARSHALL.

**Limitation of Time Waived by Submission of Trial to Justice of the Peace.**

Taking part in a trial before a justice of the peace waives objection to the jurisdiction to hear the case after the time limited by the statute.

[Syllabus by the court.]

**ERROR.**

*W. K. Stanley*, for plaintiff in error.

*Burrows & Mason*, for defendant in error.

**Corrigan v. Marshall.****WINCH, J.**

The judgment in this case must be affirmed, for it does not appear either from the transcript of the docket of the justice of the peace or the bill of exceptions, that the plaintiff in error did not consent to the continuance of the case beyond the time limited by the statute within which a justice of the peace retains jurisdiction of action begun before him.

The case had previously been adjourned for more than ninety days, by consent of plaintiff in error, to June 1, 1906. The transcript has the following entry for that date:

"June 1, 1906, at 2 P. M., John Brown, J. P., before whom this action was brought, being necessarily absent at the said time appointed for the trial of this action, the undersigned, M. Fred Nellis, justice of the peace of the same township of Cleveland, attended in his behalf at the said time and place set for said trial; whereupon parties present, case called, defendant made a motion to dismiss for want of jurisdiction. Same overruled and to which ruling defendant then and there excepted. Trial had. Plaintiff sworn and examined on his own behalf. Whereupon the case continued to June 5, 1906, at 2 P. M., for further testimony."

The entry of June 5 is as follows:

"June 5, 1906, at 2 P. M. Parties present. Case called. Hearing resumed. J. M. Corrigan sworn and examined on behalf of plaintiff. Whereupon case continued to June 6, 1906, at 9 A. M. for arguments of counsel."

The bill of exceptions shows, among other things, that the following occurred on June 1, 1906:

"The defendant, Joseph M. Corrigan, is in court only for the purpose of acting as a witness for Mary Corrigan, and makes no defense to this action."

At 3 P. M. the court adjourned the case until Tuesday, June 5, at 2 P. M. sharp, without objection from either party.

At the latter date the examination of witnesses was resumed, counsel for Corrigan taking part in cross-examination and no objection was made to the hearing being had at that time.

Our attention is called to an entry on page 9 of the bill of exceptions as follows:

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"Mr. Stanley: Mr. Joseph M. Corrigan is here only as a witness and not as a defendant in this action."

This statement was made some time after his counsel had been cross-examining witnesses in the case, and we think it was then too late for the defendant in the case, having entered upon the hearing and participated in it, to thereafter object to the jurisdiction of the court.

It is true that the presence of Corrigan at the trial as a witness would not indicate that he was consenting to the trial going forward on June 5, but by his counsel he participated in the trial and made no objection to the jurisdiction of the court. We think, therefore, that he must be held to have consented to the continuance and to have waived any rights he may have had to object to the jurisdiction of the court.

However, the judgment is affirmed.

**Marvin and Henry, JJ., concur.**

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**BOUNDARIES—FENCES.**

[Cuyahoga (8th) Circuit Court, May 18, 1908.]

Marvin, Winch and Henry, JJ.

JACOB EPSTEIN ET AL V. WILLIAM KRAFT.

**Boundary Line Established by Unconnected Fences Recognizes Line.**

Where a boundary line is conceded to be a straight line, the construction of fences along a portion of its distance, leaving a gap between them unenclosed, amounts to a recognition of the entire line and a claim to all the land bounded by it.

[Syllabus by the court.]

**ERROR.**

*A. F. Ingersoll*, for plaintiffs in error.

*J. M. Shallenberger*, for defendant in error

**WINCH, J.**

This was a case in ejectment, the plaintiff being the owner of sub-lot No. 24 in J. M. Hoyt's subdivision on the easterly side of Maple street in the city of Cleveland, and the defendant being the owner of sub-lot No. 23 in said subdivision, which is south of



## Epstein v. Kraft.

said sub-lot No. 24. Each of these lots, according to the plat, is 30 feet front and 100 feet deep to an alley in the rear. The plaintiff claims that the defendant has taken possession of a strip of land along the south side of said lot No. 24, fourteen inches wide in front and seventeen inches wide in the rear, by erecting a new fence on the northerly side of said strip. A jury was waived in the common pleas court and the trial judge found in favor of the defendant and dismissed the petition. The case is here on error and from the bill of exceptions it is apparent that the dispute between the parties as to the location of the proper boundary line between their lots is due to the fact that there is a surplus of 1 98-100 feet in the block in which said lots are situated. The defendant's surveyor, by apportioning this surplus through all the lots in the block, brings the north line of the defendant's lot to the new fence built by him. This method of apportioning the surplus through all the lots in the block and giving each lot its pro rata share is conceded to be a proper method of distributing the surplus. But the plaintiff claims that he has located 14 inches of said surplus in his lot and made it a part of said lot No. 24 by building fences and holding possession of said strip for more than twenty-one years.

There is little dispute as to the facts in the case. It is clear that the fence on the line claimed by plaintiff was built more than twenty-one years before the beginning of this suit, for a distance of 50 feet from the rear of the lot towards the front, and another fence on the same line was built more than twenty-one years before the beginning of this suit from the street line back 15 feet. There was no fence connecting these two short fences, so that there was a space of 35 feet without any fence. This space was between the houses of the plaintiff and defendant, and it was because there was no continuous fence from the front to the rear of the lot that the trial judge held that the plaintiff had failed to establish his title to the strip in dispute by adverse possession. Some support for this conclusion is found in the cases of *Smith v. Hosmer*, 28 Am. Dec. 354, and *Armstrong v. Risteau*, 59 Am. Dec. 115, for there is nothing in the evidence showing that the old fences were built upon a line agreed upon

## Cuyahoga County Circuit.

between the parties, as the proper and correct boundary line between them.

We think, however, the better doctrine is stated in the case of *O'Callaghan v. Whisenand*, 119 Ia. 566 [93 N. W. Rep. 579], the second paragraph of the syllabus of which reads as follows:

"Where a boundary line is conceded to be a straight line the construction of a building along a portion of its distance amounts to a recognition of the entire line and a claim to all the land bounded by it."

To the same effect is the case of *Buck v. Squires*, 23 Vt. 498. The same rule was applied in the case of *Wilson v. Sidle*, 17 Dec. 393 (4 N. S. 465).

We are confirmed in our conclusions by a consideration of the use to which the plaintiff put the land along the strip in dispute, which was unfenced. This part of the strip was the only access plaintiff had to the rear of his lot, and his house came within twenty-three inches of the line which he claims to be the proper southerly boundary of his land. Taking off fourteen inches of this strip, as defendant has done, by building the fence on the line he claims, leaves the plaintiff without access to the rear of his lot.

It is in evidence that the plaintiff and his predecessors in title used this strip along the side of his house with the knowledge of the defendant and his predecessors in title for the convenience of egress and ingress to and from the rear of his lot, without let or hindrance and without obstruction, for a period of more than twenty-one years before this suit was brought, and we think he thereby acquired a right by prescription to its use as incident to his land. *Pavey v. Vance*, 56 Ohio St. 162 [46 N. E. Rep. 898].

What right then had the defendant to build his new fence where he located it? We think that the plaintiff was clearly entitled to the relief prayed for in his petition and that the judgment rendered by the trial court was contrary to law and should be reversed.

While the facts upon which we arrive at this conclusion are uncontradicted, as there still remains in the case the claim for

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damages which the plaintiff has set up in his petition, for the ascertainment of said damages the cause is remanded to the common pleas court for a new trial.

Judgment reversed.

**Marvin and Henry, JJ., concur.**

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### APPEAL—REVIVOR.

[Cuyahoga (8th) Circuit Court, April, 1907.]

Marvin, Winch and Henry, JJ.

PETER J. LITTLE V. AULTMAN-MILLER CO.

Proceedings for Revivor not Appealable.

Proceedings for the revivor of an action under favor of Sec. 5149 R. S. (Sec. 11402 G. C.) are special proceedings in an action and are not appealable.

[Syllabus by the court.]

ERROR.

*Kohler, Kohler & Mottenger*, for plaintiff in error.

*Hoyt, Dustin & Kelley* and *T. H. Bushnell*, for cross-petitioner in error.

*Allen, Waters & Andress*, for defendant in error.

**WINCH, J.**

By the motion to dismiss the appeal in this action we are called upon to determine whether an appeal lies to an order of the common pleas court denying the relief prayed for in a supplemental petition filed in an action therein pending, suggesting the death of one of the defendants and asking that the action be revived as against her personal representatives.

As pointed out by Judge Shauck, in the case of *Lange v. Lange*, 69 Ohio St. 346 [69 N. E. Rep. 611], one of the three traits of an appealable cause is that it be a civil action.

In the case of *Missionary Society v. Ely*, 56 Ohio St. 405 [47 N. E. Rep. 537], Judge Spear calls attention to the fact that our statutes do not define a civil action or point out the difference between a civil action and a special proceeding, but that a marked distinction between the two is clearly indicated by the Ohio code.

## Cuyahoga County Circuit.

The proceedings here involved were brought under favor of Sec. 5149 R. S. (Sec. 11402 G. C.), which reads as follows:

"A revivor may be affected by the allowance by the court or a judge thereof in vacation, of a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of the party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action; but the limitations contained in subsequent sections of this chapter do not apply to this section."

While the pleading filed was styled by the pleader a "supplemental petition," there was no service upon it, as provided in the statute, and no entry of appearance.

If this matter was a special proceeding, it is not appealable, and following the analogy of the case of *Taylor v. Fitch*, 12 Ohio St. 169, the reasoning of which we think is applicable to this case, we hold that proceedings for revivor of an action under Sec. 5149 R. S. (Sec. 11402 G. C.), are special proceedings in an action and are not appealable. A revivor thereof may be had on error. The syllabus of the Taylor case, *supra*, reads as follows:

"A proceeding under Section 536 of the code, by petition in the court of common pleas, to vacate a judgment rendered by that court at a former term and to re-instate the case on the docket for trial, is not appealable to the district court, under the fifth section of the act of April 12, 1858, to 'relieve the district courts,' etc.

"Such proceeding is not, of itself, a civil action, but a special proceeding in an action after judgment, and subject to review only on error.

"Where such a petition contains certain allegations of specific facts, claimed to constitute unavoidable casualty or misfortune by which the defendants in the judgment were prevented from defending, and contains also separate and distinct general allegations that, without negligence on their part, the defendants in the judgment were prevented from defending by unavoidable casualty and misfortune; and there is no motion or order to make the allegations of the petition more certain and specific,

**Little v. Aultman-Miller Co.**

no bill of exceptions setting out the evidence, and no special finding by the court; and where there is a general finding by the court sustaining the general allegations of the petition, the presumption of law is that there was evidence before the court sufficient to sustain such general finding."

The appeal is dismissed for want of jurisdiction to entertain it.

**Marvin and Henry, JJ., concur.**

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**ACCOUNTS—CONTRACTS.**

[Cuyahoga (8th) Circuit Court, April 30, 1907.]

**Marvin, Winch and Henry, JJ.**

**EDWARD B. MILLER v. IRA M. MILLER.**

**Accepted Statement of Account Becomes Basis of Settlement Though Inaccurate.**

Where two brothers settle their mutual accounts and divide a common fund belonging to them equally in a manner agreed upon and arbitrary, but assumed to be equitable, the settlement must stand, notwithstanding the division was based upon inaccurate mathematical calculations.

[Syllabus by the court.]

**WINCH, J.**

Plaintiff and defendant, who are brothers, having been jointly indebted upon certain notes held by Butchel College, upon which each had made payments from time to time during a period of about eight years, the one, however, having paid much more than the other, and having come into possession of a fund of \$22,500 belonging to them equally in December, 1901, agreed to adjust their accounts and divide said fund.

They spent about ten days looking up their vouchers and then met at the house of one of the brothers and were busy almost all night figuring on a basis of settlement. The final figures arrived at they reduced to writing in two copies, both signed by the brothers as "accepted" and one copy was retained by each brother.

These writings show that after the payment of certain other joint indebtedness of the brothers, plaintiff was to have \$8,900.06

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and defendant \$4,037.53, and these amounts were afterwards received by each, after correction of the amount estimated to be due on one item of indebtedness not then paid. Plaintiff, however, now claims that he received considerable less out of said common fund than was really his due and the proof shows such to be the fact, to the extent at least of \$357.36. His right to recover that amount, however, or any sum, depends upon the nature of the agreement of settlement arrived at by the brothers on the night in question. If the brothers concluded to divide the funds in a certain manner which was arbitrary, but assumed by them as equitable, the settlement must stand notwithstanding the manner of division was based upon inaccurate mathematical calculations, unless the papers show upon their face that the money was subsequently divided between the brothers in some other manner than that agreed upon.

If no *manner* of division was agreed upon, then of course the accounts must be corrected and settlement made in accordance with the rights of the parties as they existed previous to the night they met for settlement.

Reviewing the evidence shortly, it seems clear that the brothers agreed that vouchers submitted at the meeting showed that plaintiff had paid the college (with interest) \$11,408.09 and that defendant had paid \$3,830.81; that there had been also paid the college about \$4,000 for which neither had found vouchers, and they agreed that this amount had been paid in the same ratio as the payments for which they had vouchers at hand. Thereupon they agreed that plaintiff had made two-thirds of the payments to the college and the defendant had made one-third of said payments. This ratio was approximately, but not strictly in accord with the figures before them.

It then appeared that the fund of \$22,500 on hand belonging to them equally, was more than sufficient to satisfy the amounts paid to the college. Of course the surplus belonged to the brothers in equal parts. They had other unpaid debts which they equally owed and while this surplus was not really sufficient to pay them, they agreed that they would first pay two of said debts, aggregating \$7,912.41, before they divided the balance

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of the fund. In so agreeing defendant got the worse of the bargain, but there was no mistake about it.

Proceeding upon this agreement they deducted said sum of \$7,912.41 from \$22,500, and divided the remainder into three parts, of which they agreed that plaintiff should have two parts and defendant one. Each subsequently received the amount due him as so agreed.

Taking this view of the evidence, it establishes the proposition that the brothers agreed upon a manner of division of the common fund which, while not strictly in accordance with the rights of the parties, was yet approximately so and was determined upon by them, as fair and equitable. The trial judge concluded that a settlement so made should not be disturbed and with these views we concur.

Judgment affirmed.

Marvin and Henry, JJ., concur.

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### **SPECIFIC PERFORMANCE—TENDER.**

[Cuyahoga (8th) Circuit Court, October 26, 1908.]

Marvin, Winch and Henry, JJ.

ELITA E. PECK v. ELIZABETH D. OSBORN.

#### **In Specific Performance Tender not Excused Because Vain.**

In an action for specific performance of a contract to convey real estate an allegation, "that on the 6th day of February, 1907, defendant notified plaintiff that she declined and refused to perform the conditions of said agreement on her part to be performed," does not excuse an allegation of tender of the contract price.

[Syllabus by the court.]

*H. E. Parsons*, for plaintiff in error.

*Solders, Thayer & Mansfield*, for defendant in error.

#### **WINCH, J.**

The plaintiff filed her petition in the common pleas court against the defendant praying for damages for breach of a con-

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tract to convey certain real estate. After reciting the terms of the contract, the petition proceeds as follows:

"That on the 6th day of February, 1907, defendant notified plaintiff that she declined and refused to perform the conditions of said agreement on her part to be performed. Plaintiff had theretofore paid to defendant the sum of \$100 as part payment on said purchase price, and was at all times ready and offered to perform the conditions of said agreement on her part to be performed."

A demurrer to this petition was sustained, because no tender by plaintiff of the balance of the purchase price of \$8,375 was pleaded. That allegation of tender is ordinarily necessary in such cases is held in the case of *Randabaugh v. Hart*, 61 Ohio St. 73, [55 N. E. 214; 76 Am. St. 361], where it is said:

"Where two acts are to be done at the same time, as when the vendor has agreed to convey interest in real estate upon the payment of a given sum as purchase money, the deal to be closed by a certain day named, and the purchaser has agreed to pay the purchase money, a part on that day and the balance in one year, the conditions are what are known in law as mutual conditions, and neither party can maintain an action against the other without averring a performance, or an offer to perform on his part. Mere willingness and readiness to perform uncommunicated to the other party, will not avail. And it is not, in such case, sufficient that the plaintiff aver that from the date of the making of the contract to and including the day at which it was to be completed, he was ready and willing to do and perform everything to be done by him in the carrying out of said sale and contract. Nor are the averments sufficient, when, in addition thereto, he avers that the defendant, although often requested so to do, has refused to comply with said contract, and has at all times refused to transfer and deliver said property to plaintiff.

"A petition declaring upon such contract, which contains neither an allegation of performance nor of tender of performance, will be held bad on general demurrer."

But it is said by counsel for plaintiff in error that tender is



## Peck v. Osborn.

excused, because it is vain, when the defendant absolutely repudiates the contract and refuses to be bound by it.

This exception to the general rule is thus stated in *Wiedemann Brew. Co. v. Maxwell*, 78 Ohio St., 54 [84 N. E. 595] :

"The general rule is that a party seeking specific performance of a contract must show performance on his part, yet there are clearly defined exceptions and one of them is that when the other party repudiates and makes it certain that he does not intend under any circumstances to comply, a showing of readiness and ability on the part of the complaining party to then and there perform his part communicated to the other party and accompanied with a demand of compliance by such other party, is sufficient compliance without an actual formal tender."

Does the petition square itself by this rule, and show that the defendant repudiated and made it certain that she did not intend, under any circumstances, to comply with the contract?

The allegation is: "on the 6th day of February, 1907, defendant notified plaintiff that she declined and refused to perform the conditions of said agreement on her part to be performed."

*Non constat*, that she might have changed her mind and been willing to perform the next day. At any rate we do not think the plaintiff has pleaded defendant's refusal to perform in strong enough terms to exempt him from a tender.

Judgment affirmed.

**Marvin and Henry, JJ.**, concur.

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**BILL OF EXCEPTIONS—ERROR.**

[Cuyahoga (8th) Circuit Court, October 26, 1908.]

Marvin, Winch and Henry, JJ.

STATE BANKING & TRUST CO. v. C. A. KRAUSE, JR., TRUSTEE,  
ET AL.

Motion to Strike Bill of Exceptions from Files Lost for Failure to Show Prejudice.

A motion to strike a bill of exceptions from the files on the ground that one of the defendants in error was not notified of its filing and so had no opportunity to file exceptions to it, will be overruled, the mover showing no prejudice to his rights.

[Syllabus by the court.]

*Smith, Taft & Arter*, for plaintiff in error.

*Carpenter, Young & Stocker, Kline Tolles & Goff* and  
*Smith, Taft & Arter*, for defendant in error.

**WINCH, J.**

Motion is made in this case by B. D. Nicola, one of the defendants, to strike the bill of exceptions from the files because the clerk failed to notify him of the filing of said bill, as required by Sec. 5301 R. S.

He suggests that perhaps he might have corrected the bill if it had been submitted to him, but he fails to point out any particulars in which the bill is wrong, or show any prejudice which might arise to his rights from a use of the bill in the case.

Motion overruled on authority of *Davies v. Railway*, 71 Ohio St., 325 [73 N. E. 213].

**Marvin and Henry, JJ.**, concur.

*Sanderson v. Banks.*

### **CARRIERS.**

[Cuyahoga (8th) Circuit Court, October 26, 1908.]

Marvin, Winch and Henry, JJ.

G. C. SANDERSON v. W. A. BANKS Co.

**Bill of Lading Attached to Draft not Conclusive as to Reservation of Jus Disponendi.**

When a shipper under instructions from the buyer attaches a bill of lading to a draft and forwards it to a designated bank for collection, there being no course of dealing between the parties shown, it is for the jury to say, upon loss of the goods during shipment, whether or not the seller had reserved the *jus disponendi* and that therefore the loss should fall upon him.

[Syllabus by the court.]

**ERROR.**

*D. B. Carpenter*, for plaintiff in error.

*White, Johnson, McCaslin & Cannon*, for defendant in error.

**WINCH, J.**

This was an action for the value of a carload of oranges alleged to have been sold and delivered to the defendant at an agreed price. The answer was a general denial, but the whole controversy arose over the question of delivery. The oranges never reached the defendant.

The plaintiff introduced evidence tending to prove that the contract was for a carload of oranges at \$1.60 per box f. o. b. cars, St. Petersburg, Florida; that the oranges were inspected by defendant's agent, packed and put on board a car, with instructions to the carrier to forward them to the defendant at Cleveland. That a bill of lading was made out naming defendant as consignee, and, upon telegraphic instructions from the defendant, this bill of lading was attached to a draft drawn upon the defendant and deposited with a bank to be forwarded to Cleveland for collection. The draft was never paid. What became of the oranges was not shown. Upon this state of the evidence, at the close of plaintiff's case, the trial judge directed a verdict for the defendant. This action, we are informed by

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defendant's counsel, was based upon the decision in the case of *Emery's Sons. v. National Bank*, 25 Ohio St., 360, but as we read it, said case appears to be a clear authority for reversal of this judgment.

It must have been held by the trial judge, as it was argued by counsel for defendant in this court, that the act of plaintiff in attaching the bill of lading to the draft, which he discounted at the bank, was conclusive evidence that the consignor reserved to himself the *jus disponendi* of the goods shipped, until the draft should be paid. If such effect is not to be given to this act, the case cited is authority for a submission to the jury for determination of the intention of the consignor. With this point in mind, let us read the first four and the sixth paragraphs of the syllabus of the case cited:

"1. By the rules of commercial law, a bill of lading is regarded as the symbol of the property therein described; and in the case the shipper reserve to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier to the consignee, as effectually by the delivery of the bill of lading as by the delivery of the property itself.

"2. If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of the intention, to be gathered from all the facts and circumstances of the transaction.

"3. If the right to control the property be reserved by the shipper, the carrier must be regarded as his agent; and if not, then as the agent of the consignee.

"4. On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive.

"6. Where a vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier, and intending to reserve the right of control over them, at the same time draws upon the purchaser for the price, and delivers the bill in exchange, with the bill of lading attached, to an endorsee, for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the right of the holders of the bill of lading to demand payment of the bill of exchange, and can not

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retain the price of the goods on account of a debt due to him from the consignor."

In the case before us it was the defendant who directed that the bill of lading be attached to the draft and for his convenience in making payment that it was done. There was no previous course of dealing between the parties as there was in the case cited. Indeed, we think a jury might well come to a conclusion contrary to that arrived at by the trial judge. At any rate he should have submitted the case to the jury under proper instructions for it to determine from "all the facts and circumstances of the transaction" whether it was the intention of the plaintiff to reserve the *jus disponendi* when he attached the bill of lading to the draft.

For error in directing a verdict, the judgment is reversed.

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### **ALIENS—MANDAMUS—NATURALIZATION.**

[Cuyahoga (8th) Circuit Court, November 16, 1908.]

Marvin, Winch and Henry, JJ.

STATE, EX REL JOHN GALLAGHER, v. CHARLES P. SALEN, CLERK.

**Mandamus does not Lie to Compel Clerk of Common Pleas to Issue Naturalization Papers.**

A writ of mandamus will not lie to require the clerk of the common pleas court to issue citizenship papers to "an honorably discharged soldier of the national guard of the state of Ohio," until the court of which he is clerk has been satisfied that relator is eligible to citizenship and has shown that he has declared his intention to become a citizen and has resided within the state for one year and is of good moral character.

[Syllabus by the court.]

ERROR.

*Myler & Turney*, for plaintiff in error.

*William L. Day*, for defendant in error.

**WINCH, J.**

This was an application for a writ of mandamus to compel the clerk of the common pleas court to issue citizenship papers to the relator.

## Cuyahoga County Circuit.

A demurrer to the petition being sustained, the case is here on error.

The petition alleges that the relator "is a male alien of over the age of twenty-one years and an honorably discharged soldier of the national guard of the state of Ohio."

By this allegation it was sought to bring the relator under the provisions of Sec. 2166 U. S. Stat., which reads as follows:

"Any alien of the age of twenty-one years, and upwards, who has enlisted or may enlist, in the armies of the United States either regular or the volunteer forces, and has been or may be hereafter honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States."

It is claimed that a member of the Ohio National Guard is enlisted in the volunteer forces of the United States, by virtue of the provisions of the Dick law, so-called.

The judgment of the common pleas court appears to be sustainable upon any one of three grounds:

First. Under the Dick law, only those aliens who have declared their intention to become citizens of the United States may be members of the militia of the several states subject to call as forces of the United States (see 10 Fed. Stat. Ann., 227), and Gallagher bases his application for naturalization upon his service in the state guard for the sole purpose of exempting himself from the requirement that he first declare his intention to become a citizen.

Second. The petition fails to show that the relator has resided within the state of Ohio for one year and is of good moral character, "as now provided by law," in Sec. 2165, U. S. Stat.

Third. The writ is asked to be directed to the clerk of the court, while he has no authority to issue naturalization papers until the court to which application is made is satisfied by com-

State v. Salen.

petent proof that the alien is eligible to citizenship. There is no allegation that any court has been so satisfied.

Judgment affirmed.

**Marvin and Henry, JJ., concur.**

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### **MALICIOUS PROSECUTION.**

[Cuyahoga (8th) Circuit Court, November 16, 1908.]

Marvin, Winch and Henry, JJ.

\*C. F. ADAMS CO. v. CHAUNCEY ROBERTSON.

**1. Action Against Corporation for Malicious Prosecution, Plaintiff May Testify Connection with Company in Other States.**

In an action for malicious prosecution against a corporation, it is not error to permit the plaintiff to testify as to his connection with the company in other states, notwithstanding the prosecuting witness, the managing agent of the company, had no knowledge of such connection.

**2. Binding Accused to Grand Jury not Probable Cause.**

Proof that the examining magistrate bound the accused over to the grand jury, is not conclusive evidence of probable cause. *Ash v. Marlow*, 20 Ohio 119, followed, but doubted.

**3. Punitive Damages Recoverable in Malicious Prosecution.**

In an action against a corporation for malicious prosecution, punitive damages may be allowed.

[Syllabus by the court.]

**ERROR.**

*Albert Lawrence*, for plaintiff in error.

*C. W. Noble*, for defendant in error.

**WINCH, J.**

This was an action for malicious prosecution, plaintiff in error being defendant below.

Several errors are alleged to have been committed at the trial, which we shall examine in their order.

The defendant below is a corporation. One H. W. Lewis was its managing agent and swore to the affidavit upon which Robertson was arrested upon a warrant issued by a magistrate.

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\*Affirmed, no op., *C. F. Adams Co. v. Robertson*, 82 O. S. 400.

## Cuyahoga County Circuit.

The plaintiff being upon the stand was interrogated by his counsel as to his previous connection with the Adams Company in other states. To this objection was made, unless knowledge of this previous employment was brought home to Lewis, the prosecuting witness.

This objection was overruled and properly, we think, because it was the company, not Lewis, which was defendant in the case, and the charge alleged to be false was that Robertson had embezzled from the company, not from Lewis.

The court charged, as requested by the defendant, that the fact that Robertson was bound over to the grand jury by the examining magistrate was *prima facie* evidence of probable cause for prosecution, but refused to charge that such examination and binding over was conclusive evidence of probable cause.

This ruling was correct according to the holding of the Supreme Court of Ohio, though were the matter one of original impression, we would be much influenced by the argument of counsel upon the subject.

The third paragraph of the syllabus of the case of *Ash v. Marlow*, 20 Ohio, 119, reads as follows: "Proof that the examining magistrate 'bound the accused over to court,' is not conclusive evidence of 'probable cause.'" And this statement is borne out by the opinion in the case, which was delivered by Judge Spalding.

We find no error in refusing defendant's fifth and sixth requests to charge, and the court's definition of the meaning of the words *prima facie*, used in defendant's fourth request to charge, while not very enlightening, did not prejudice the defendant.

Complaint is made that the trial judge submitted to the jury the question of allowing punitive damages against the defendant. It is claimed that this was wrong, because the defendant was a corporation and could not be guilty of actual malice and that none in fact was shown. The charge upon the subject was correct, and as actual malice as well as imputed malice may be proved from circumstances indicating it, we are unable to say that the trial judge erred in submitting the question to the jury. The fact that the defendant was a corporation did not exempt



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it from liability to punitive damages. The rulings in Ohio are uniform upon this subject.

Finally upon the weight of the evidence, both as to all the evidence on the subject of probable cause and that part of it which referred particularly to the issue of advice of counsel, while the jury might well have found the other way, we can not say that their verdict is so manifestly against the weight of the evidence that the judgment based upon it should be reversed. The trial judge, as well as the jury, saw the witnesses, and we think he did his whole duty when he reduced the verdict from something over \$900 to \$400. Doubtless he, as well as the jury, were impressed with the fact that the prosecuting witness did not make a full and candid disclosure of all the facts to his counsel, before the latter advised that Robertson be prosecuted upon a criminal charge.

Finding no error in the record the judgment is affirmed.

**Marvin and Henry, JJ., concur.**

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### CONTRACTS—DAMAGES.

[Cuyahoga (8th) Circuit Court, November, 1908.]

Marvin, Winch and Henry, JJ.

ARTHUR COWDRICK V. EDWARD J. SEARLES ET AL.

**Speculative Profits Which Might Have Resulted not Counter-Claim Damages in Breach of Contract.**

In an action for the balance due on a contract for building greenhouses, the defendants counter-claimed for damages arising from delay in finishing the greenhouses on time, whereby they lost one crop of lettuce and the profits therefrom. Held: That loss of profits in such manner were too speculative to be submitted to the jury.

[Syllabus by the court.]

ERROR.

**WINCH, J.**

Cowdrick brought suit against Searles Brothers on a contract for the erection of certain large greenhouses, about 150 feet

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wide and 80 feet long, which he erected for the defendants at a cost of about \$45,000. He claimed about \$4,500 due him under the terms of the contract, being 10 per cent. upon the cost of the buildings. The defendants counter-claimed for poor and defective work and also for damages arising from delay in finishing the greenhouses on time, whereby they lost one crop of lettuce and the profits therefrom. Their answer alleges that the plaintiff knew the use the buildings were to be put to and the number and kind of crops that were to be raised therein and made his contract to have the greenhouses completed by October 1, 1906, in contemplation of the use to which the property was to be put.

Evidence was introduced by the defendants tending to establish the allegations of their answer, and as establishing the amount of damages arising from delay in completing the work the court permitted the defendants to introduce evidence as to the value of the crops of lettuce raised in the greenhouses during the season of 1906 and 1907, after they took possession of the buildings and the profits they would have realized from the crop of lettuce they lost.

The court also charged the jury that the defendants might have damages for delay in completing the work, if the jury should find them entitled to such damages, "which would be the proper allowance for one crop of lettuce."

We think that in admitting evidence as to the profits from a crop of lettuce and charging with relation thereto, as he did, the trial judge erred.

The general rule that loss of profits should be excluded in estimating damages for breach of a contract, is well known. It is based upon the uncertainty arising from contingencies wholly conjectural which affect all business, and which can hardly be apprehended by both parties when the contract is made.

While it is urged in this case that lettuce growing in hot houses has been reduced to an exact science, so that you can tell just how many pounds of lettuce can be grown in a given time in houses of a given area, the personal equation must not be overlooked. Some men have more knowledge and skill than others; hired help grow careless; capital is sometimes impaired

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by outside influence. Above all, the market can not be controlled. We see no reason for excepting the lettuce business from this general rule, and find sufficient authority for our conclusion in the adjudicated cases in Ohio.

The case of *Cincinnati v. Evans*, 5 Ohio St., 594, involved the business of a merchant tailor. Judge Ranney delivered the opinion of the court, and part of the syllabus of the case reads as follows:

"In an action of trespass for an injury to a building occupied by the plaintiff as a store, resulting in an interruption of his business, he may recover, in addition to the damages done to the building, such further sum as will compensate him for the loss of its enjoyment while such interruption continued.

"For this purpose, it is competent to prove the nature and extent of the business, the necessity of using the building for its prosecution, and the value of such use to him during the period of interruption.

"But in the absence of fraud, or malice, or other circumstances justifying the recovery of exemplary damages, the amount of profits which might have been realized by employing his personal services and capital in the prosecution of his business in the injured building during such interruption can not be recovered.

"In such case, the loss of profits does not furnish a proper rule for estimating the damages; but the loss of the use of the property, and the value of such use to the injured party, is all that can be received."

The syllabus of the case of *Rhoades v. Baird*, 16 Ohio St., 573, is as follows:

"An action was brought on a contract by which the defendant agreed to make a lease, for the term of ten years, to the plaintiff, of certain lands on which to plant and cultivate a peach orchard. The breach consisting in the failure of the defendant to make the lease, and in his causing the plaintiff within two years from his taking possession, to be evicted from the premises, but plaintiff was permitted to give evidence of the probable profits that might in the future be realized from the

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orchard, judging by the number of crops and the prices of peaches in the county for the last ten and fifteen years. *Held:*

“(1) The evidence as to the probable future profits was incompetent to be given in chief by the plaintiff, as furnishing a basis for the assessment of damages by the jury, such evidence being uncertain and speculative in its nature and in a great degree conjectural.

“(2) To the extent that damage depended on the loss of the use of the property for the term, its market value at the time of the eviction subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value, its value should be ascertained from witnesses whose skill and experience enabled them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.”

The case of *Champion Ice Manfg. & Cold Storage Co. v. Iron Works Co.*, 68 Ohio St., 229 [67 N. E. 486], involved the loss of profits in the manufacture of ice, which would seem to be as certain a business as raising lettuce. The syllabus of the case is as follows:

“In an action by the owner of machinery used in a plant in actual operation to recover damages for the breach of a contract to furnish at the time specified an essential part of a disabled machine, the measure of damages is the value of the use of the machine in the business for the time which intervened between the date for delivery and the date of actual delivery, if the circumstances are known to both parties at the time of making the contract.”

The same rule was followed in this circuit in the case of *Johnson v. Slaymaker*, 9 Circ. Dec. 500 (18 R. 104), which involved damages for failure to complete on time the Oak Ridge Sanitarium, at Green Springs, Ohio. Judge King, who delivered the opinion of the court, thus states the rule, in the ninth paragraph of the syllabus of the case:

“The proper measure of damages for failure to complete the building within the time stipulated in the contract is the value of the use of the building during the months its completion was

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delayed, if it had been completed according to and within the time stipulated in the contract."

The opinions of the three Supreme Court cases cited, fully set forth the kind of evidence admissible in proving the damages resulting from loss of use of the property and will be a sufficient guide, upon a re-trial of this case, for the trial judge, in ruling upon evidence so that it is unnecessary to rule upon each exception taken by plaintiff in error to the admission or rejection of evidence.

For errors in ruling on evidence and in the charge, as indicated, the judgment is reversed.

**Marvin and Henry, JJ., concur.**

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### CIVIL RIGHTS.

[Cuyahoga (8th) Circuit Court, December 7, 1908.]

*Marvin, Winch and Henry, JJ.*

**HUMPHREY Co. v. LOUIS H. COHEN.**

**Ejection from Amusement Resort Legal where no Fee is Charged.**

The proprietor of an amusement resort at which no entrance fee is charged, has a right to eject any person from the ground for violation of any rule, reasonable or unreasonable, which he may see fit to adopt, provided he uses no unnecessary force in so doing.

[Syllabus by the court.]

**ERROR.**

*Smith, Taft & Arter*, for plaintiff in error.

*E. Maloney and Fred Desberg*, for defendant in error.

**WINCH, J.**

Petition in error is filed in this court to reverse a judgment for \$400 recovered by Cohen against the Humphrey Co. for an alleged assault and battery, resulting from excessive force used in ejecting Cohen from the grounds of the Humphrey Company, which operates a place of amusement for the public known as Euclid Beach Park, near the city of Cleveland, in Cuyahoga county, Ohio. The amended petition alleges that

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Cohen being on the grounds of the Humphrey Company with his little girl, three years old, and separated from his wife and another child, was compelled to take his little girl into the men's closet on the grounds in order that she might relieve herself according to the demands of nature. He was ordered out of the closet by an attendant, had some words with him, was taken to the office of the company on the grounds where he had further words with the manager of the company, was ordered to leave the premises, went in search of his wife and other child, delayed a few minutes to have coffee with them, was ordered away and thereupon was set upon, beaten and dragged out, being cast into the hands of a police officer of the village of Collinwood, and caused to be locked up. He alleges that all these acts were wrongfully and maliciously done by the servants of the Humphrey Company, and that in addition to the physical injuries he suffered he was made an object of public humiliation, ridicule and contempt.

An amended answer admits that Cohen was ordered out of the men's closet and ordered to leave the grounds; it further alleges that the company had a rule, of which Cohen was notified, that no female children should be permitted in the men's toilet room; that he persisted in violating said rule, and in so doing conducted himself in a disorderly manner; that Cohen was thereafter ordered to leave the premises, refused to go and was thereupon ejected, but with no greater force than was necessary.

A reply denies this plea of justification.

The case was submitted to a jury with the result stated. Many reasons are assigned why the judgment on the verdict should be reversed, but we shall notice only the one which we think should entitle the plaintiff in error to a new trial. Among other things the court charged the jury as follows:

"The defendant denies, by way of defense, that the assault, if any was made, was malicious, and says that in ejecting plaintiff from its grounds it used no greater force than it was justified in using to enforce its reasonable rules and regulations for the proper conduct of its business. This is a good defense, if established by the proof. The defendant, conducting, as it did, a

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place of amusement and entertainment for many thousands of people, had a right to provide for such reasonable rules and regulations for the conduct of those who chose to visit its park. It was its duty to see that its guests did not suffer wrong from its agents or servants, and it had a right also to declare a rule as to whom should not be allowed to enter the apartments especially provided for the private accommodation of men. Whether the rule the company adopted and undertook to enforce was reasonable or not, is for you to determine. The word 'reasonable' in this connection, means fair and sensible, in view of all the circumstances. Those rules are deemed reasonable where they are fit and appropriate to the end in view, to-wit, the protection of the public, and they are adopted in good faith for that purpose; and if you should find from the evidence that it was a reasonable rule and that the plaintiff knew of that rule, or had reasonable ground to know of it and was in the act of violating it by taking and having with him his female child, then the defendant, through its agents and officers, had a right to detain him, admonish him, or expel him from the apartments or from the grounds; but, first before assaulting the body of the plaintiff, it was first the duty of the defendant to request him to leave, and then, on his refusal, it could only use such force as was reasonably necessary to remove him."

We think it was error for the trial judge to charge that whether the rule the company adopted and undertook to enforce was reasonable or not was for the jury to determine.

The pleadings and the evidence show that Cohen was upon the private property of another. That he was there by invitation, as one of the public, whose presence was desired on the grounds to the end that they might patronize the amusements conducted thereon for profit to the owner, makes him a licensee and so distinguishes him from a trespasser, but gives him no right to remain thereon beyond the pleasure of the owner. This license the owner might revoke upon any pretext, reasonable or unreasonable, or through mere whim or caprice. Upon the owner's making known to Cohen his desire that he leave the premises, it was Cohen's duty to comply without unnecessary delay. This the court should have charged the jury instead

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of as he did regarding the violation of a rule, the reasonableness of which he left to the jury to determine.

It will be understood that the civil rights of the plaintiff as protected by the statute (Sec. 4426-1 and 4426-2 R. S., Sec. 12940 to 12942 G. C.) are not involved in this case. There is no claim that Cohen was ordered off the grounds or discriminated against on account of his nativity, race, color or persuasion, religious or political. Nor have we here any right of Cohen arising *ex contractu* by reason of his having paid an entrance fee; the gate is free at Euclid Beach Park.

The conclusions here reached are sustained by the opinion of Judge Swetland of the S—— Court of Rhode Island, in the celebrated case of Fred J. Buenzle, a yeoman in the United States navy, who was refused admission to a place of resort operated by the Newport Amusement Association because he was dressed as a sailor. We have no reference to a published report of the case, but a list of the authorities cited in the opinion of Judge Swetland is subjoined.

For error in the charge, the judgment is reversed.

*Wood v. Leadbitter*, 13 Mees & Wells, 838; *Purcell v. Daly*, 19 Abb. New Cases, 301; *Benton v. Schoeff*, 83 Mass. (1 Allen), 133; *McCrea v. March*, 78 Mass. (12 Gray), 211; *Pearce v. Spalding*, 12 Mo. App., 141; *Greenberg v. Turf Assn.*, 146 Cal., 357 [73 Pac. 1050]; *Smith v. Leo*, 92 Hun, 242; *Drew v. Poor*, 93 Pa. St., 234; *Horney v. Nixon*, 213 Pa. St., 20 [61 At. 1088; 1 L. R. A. (N. S.) 1184n; 110 Am. St. Rep. 520n; 5 Ann. Cas. 349]; *Younger v. Judah*, 111 Mo., 303 [19 S W. 1109; 16 L. R. A. 558; 33 Am. St. Rep. 527]; *Collister v. Hayman*, 183 N. Y., 250 [76 N. E. 20; 1 L. R. A. (N. S.) 1188n; 111 Am. St. Rep. 740; 5 Ann. Cas. 344].

**Marvin and Henry, JJ.**, concur.



Unkrich v. State.

### PURE FOOD LAWS.

[Cuyahoga (8th) Circuit Court, December 14, 1908.]

Marvin, Winch and Henry, JJ.

PHILLIP UNKRICH V. STATE OF OHIO.

**Deficient Fats or Solids Sufficient Proof in Prosecution for Selling Milk Below Standard.**

It is sufficient to sustain a conviction in a prosecution for violation of the statutes regulating the sale of milk, if the state prove that the milk sold contained less than the required amount of fats or solids, without showing any adulteration of it, or addition to it of water or other substance, or that the cows from which the milk came were diseased or sick.

[Syllabus by the court.]

ERROR.

*C. L. Selzer, Klein & Harris and Willis Vickery*, for plaintiff in error.

*Dan C. Cull*, for defendant in error.

#### WINCH, J.

Phillip Unkrich was convicted in the police court of violating those sections of the pure food laws which regulate the sale of milk. The state proved that the milk Unkrich had in his possession, with intent to sell, contained two and seven-tenths per cent. fats and eleven and fifty-eight one-hundredths solids. It is said by counsel for plaintiff in error that the state should have proved more than this, to-wit: either that the milk was adulterated, or that water or some other foreign substance had been added to it, or that it was from diseased or sick cows. It is further claimed that milk comes from certain healthy cows, particularly at certain seasons of the year, containing less fats and solids than the standard prescribed by law, and that to forbid the sale of such milk would be unconstitutional. Both of these claims, we think, are untenable.

The law provides:

"4200-4. Whoever, by himself or his servant, or agent, or as servant or agent of any other person, sells, or exchanges or

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delivers or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk or milk to which water has been added, or any foreign substance, or milk from diseased or sick cows, shall, for a first offense, be punished," etc.

"4200-12. In all prosecutions under this chapter, if the milk is shown upon analysis to contain more than eighty-eight per cent. of watery fluid, or to contain less than twelve per cent. of solids or to contain less than three per cent. of fats, it shall be deemed for the purpose of this chapter to be adulterated."

1. In the case of *State v. Dairy Co.*, 62 Ohio St., 350 [57 N. E. 62; 57 L. R. A. 181], it was held:

"The police power of the state is properly exercised in the prevention of deception in the sale of dairy products, and in the protection of the health of the people, and it is within the scope of this power to regulate the manufacture and sale of articles of food, even though the right to manufacture and sell such articles is a natural right guaranteed by the Constitution."

So, we see, the law under consideration is designed not only as a protection against fraud, but also as a protection of the health of the people.

For the protection of the public health, evidently, it is declared that milk from diseased or sick cows shall not be sold. Manifestly it may be detrimental to the public health, particularly the health of infants, that thin or watery milk should not be sold, even if it is the cow's fault alone, that the milk is not up to a certain standard.

2. In the case of *State v. Smith*, 69 Ohio St., 196 [68 N. E. 1044], the first paragraph of the syllabus reads:

"The sale of milk containing ten and sixty-one hundredths per cent. of solids, and no more, is punishable under the act of April 10, 1889, to regulate the sale of milk, and the affidavit need not allege that milk is an article of human food."

Applying the reasoning of that case to the claims here made, we may go further and say that the affidavit need not allege more than the mere fact that the milk did not contain the required amount of fats or solids.

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We think that this was intended to be stated on page 200 of the opinion in the case where Judge Shauck says:

"Counsel for the defendant do not demonstrate, nor does it appear to be demonstrable, that the act charged, to-wit: selling milk which contained ten and sixty-one hundredths per cent. of solids, and no more, is not a violation of the statute."

Judgment affirmed.

**Marvin and Henry, JJ., concur.**

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**MALICIOUS PROSECUTION.**

[Cuyahoga (8th) Circuit Court, December 14, 1908.]

**Marvin, Winch and Henry, JJ.**

**SOLOMON I. SCHWARTZ ET AL V. MAX FRIDRICK.**

**In Malicious Prosecution Defendant Permitted to Testify as to His Malice.**

In an action for malicious prosecution it is proper to permit the defendant to testify that he had no malice or hard feeling toward the plaintiff when he caused his arrest, but acted in good faith.

[Syllabus by the court.]

**ERROR.**

*Smith, Taft & Arter*, for plaintiffs in error.

*C. W. Noble*, for defendants in error.

**WINCH, J.**

This was an action for malicious prosecution with judgment for the plaintiff below.

The burden of showing malice and want of probable cause was upon the plaintiff. The defendant to disprove malice and want of probable cause offered himself as a witness and was permitted to testify that he believed the plaintiff was guilty of larceny at the time he swore to the affidavit which the assistant prosecutor of the police court of the city of Cleveland prepared and directed him to sign.

He was not permitted, however, to answer the following question:

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"Did you sign this affidavit with any malice or any hard feeling against Mr. Fridrick?"

To which question the plaintiff objected; which objection was sustained by the court; to which ruling of the court the defendants then and there excepted and stated that they expected the witness to answer, if permitted, that he signed it without malice.

"Was the signing of that affidavit by you done in good faith?"

To which question the plaintiff objected; which objection was sustained by the court; to which ruling of the court the defendants then and there excepted and stated that they expected the witness to testify that the affidavit was signed in good faith.

A majority of the court is of the opinion that these rulings were erroneous. Support for this view is found in 19 Am. & Eng. Enc. Law, 695, and cases cited. It is claimed that the state of the witness' mind is a fact as to which he may testify. The Supreme Court has so held in the case of *White v. Tucker*, 16 Ohio St., 468, where it is stated that the defendant may testify as to his belief in the guilt of the plaintiff.

But is the analogy perfect, except in the case of actual malice? Quoting again from the Encyclopedia referred to, at page 676:

"Where a criminal prosecution is begun under circumstances making it apparent that the person instituting it had some collateral private purpose in view, rather than the vindication of the law, legal malice is shown. Thus, if a criminal prosecution is instituted to compel the delivery of property, or to coerce the payment of a debt, the proceedings will be deemed malicious in law."

We know that a belief is a fact, which any truthful witness can truthfully state, but his motives are to be judged by the public conscience and not his own. This witness might truthfully have said: "The plaintiff had taken some goods from me and wouldn't tell where they were. I hoped to recover the goods, by having him arrested, but I entertained no malice in so doing." His opinion in this respect would have been erroneous, for the law implies malice from such conduct. And here

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lies the danger. The question asked would have permitted the witness to characterize his own conduct and thus substitute his opinion for that of the jury. This view is indicated in the case of *John v. Bridgman*, 27 Ohio St., 22, 43.

It is unfortunate that it has fallen to me to prepare the opinion in this case, but, as I concur in the reversal of the case on other grounds, it is a matter of little consequence.

I think the verdict was against the weight of the evidence. To me it seems clear that it was not the employe or agent of plaintiffs in error, but the assistant prosecutor of the police court, who, acting upon his own examination and judgment, caused the arrest complained of.

My brethren do not agree with me as to our duty to reverse the judgment for this reason.

Judgment reversed for error in ruling on evidence.

Marvin and Henry, JJ., concur.

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### COVENANTS—MORTGAGES.

[Cuyahoga (8th) Circuit Court, December 14, 1908.]

Marvin, Winch and Henry, JJ.

\*CLEVELAND & S. BREW. CO. v. JOSEPH KRAVAL.

**Covenant to Sell Only Mortgagor's Brew of Beer Enforceable in Equity.**

A covenant in a mortgage securing a credit to a saloon-keeper in his business, that he will sell no ale, beer or porter on the mortgaged premises for five years, except the brew of plaintiff, is enforceable in equity.

[Syllabus by the court.]

**ERROR.**

*Higley & Maurer*, for plaintiff in error.

*Solders, Thayer & Mansfield*, for defendant in error.

**WINCH, J.**

We are unable to distinguish this case from *Cleveland & S. Brew. Co. v. Demko*, 29 O. C. C., 102 (9 N. S. 130).

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\*Affirmed, no op., *Kraval v. Brewing Co.* 82 O. S. 395.

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In that case the consideration for the mortgage, whose covenants were identical with the mortgage involved in this case, was an advance of \$2,700 in money; in this case it is a credit of \$700 to the defendant in his business, \$500 of which was evidenced by his promissory note. If the consideration was good to begin with the execution and delivery of the mortgage deed to the plaintiff vested it with the title to the premises therein described, subject to the conditions of the mortgage. Among other conditions was the covenant that no beer, ale or porter of any other brew than that of plaintiff should be sold upon the premises for five years. The Demko case holds that this covenant survives the payment of the mortgage debt.

Plaintiff is not seeking possession of the premises under its mortgage deed, by ejectment, but enforcement of a covenant as to the use of the premises by the defendant.

This covenant is enforceable in equity (*Stines v. Dorman*, 25 Ohio St., 580). We do not think that defendant has proved that plaintiff failed to furnish "good, wholesome and merchantable beer," by reason whereof he is entitled to a cancellation of the mortgage deed.

In the Demko case, as in this case, we follow the authorities which deal with covenants as to the use of land, contained in executed conveyances, whether by deed or lease, and so distinguish this class of cases from those brought for the enforcement of executory agreements concerning personal services, or personal property, some of which have the added debatable infirmity of being unenforceable against the plaintiff, thus lacking mutuality, as was argued, but not decided in the case of *Steinau v. Gas Co.*, 48 Ohio St., 324, 332 [27 N. E. 545].

Judgment for plaintiff.

**Marvin and Henry, JJ., concur.**

Gruber v. Austgen.

### LANDLORD AND TENANT.

[Summit (8th) Circuit Court, October 8, 1908.]

Marvin, Winch and Henry, JJ.

FRANK GRUBER V. MICHAEL AUSTGEN ET AL.

**Landlord not Liable for Injuries on Leased Premises While Landlord without Entry Reservation was Making Repairs.**

In an action for damages for personal injuries received by falling into an opening in a floor which was being repaired by a landlord with the consent of his tenant, it is not sufficient to charge the landlord to allege that he was in possession of the premises in common with the tenant, such allegation implying the tenant's consent to the landlord's entry. It is only where the landlord reserves the right to enter for the purpose of making repairs without the tenant's consent, that he can be held liable in such case.

[Syllabus by the court.]

**ERROR.**

**WINCH, J.**

This was an action for damages for personal injuries sustained by plaintiff by reason of falling into an opening in the floor of a rear room adjoining the saloon of defendants, Austgen & Pfeiffer, tenants of defendant Ley. Both rooms were leased to the tenants. The third amended petition seeks to hold both the landlord and his tenants, but a demurrer by the landlord to this petition was sustained, and plaintiff not desiring to plead further, the landlord was dismissed from the action and the case is properly here for review on error.

Plaintiff was a customer of the saloon-keeper and lawfully upon these premises. Having occasion to go to the water closet in the rear of the building he passed through the rear room in safety, but upon returning, fell into the hole complained of. This happened about nine o'clock in the evening.

The allegation in the petition relied upon by plaintiff to save his case against the landlord, is as follows:

"Plaintiff further says that just prior to the time of the receipt of the injuries complained of, the said Adolph A. Ley, the owner of said premises, with the knowledge, acquiescence and

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consent of the said defendants Austgen & Pfeiffer, took possession of the said rear room in common with them for the purpose of making certain alterations, changes and repairs therein; and in making said alterations, changes and repairs, said Adolph Ley carelessly and negligently caused a portion of the flooring in said rear room to be removed and left in a dangerous and unsafe condition, said Adolph A. Ley still having possession of said room in common with the said defendants, Austgen & Pfeiffer; that the fact that said flooring had been carelessly and negligently removed and left in a dangerous and unsafe condition was well known to the defendants, Austgen & Pfeiffer."

The description of Ley "as owner of said premises," is not sufficient, for that is no allegation that the landlord had a right to enter for the purpose of making repairs without his tenants' consent. Indeed such consent is specifically pleaded. Nor is the allegation that the landlord was in "possession of said room in common with the said defendants," the tenants, of controlling force.

Such is the possession of a contractor in cases like this, but here the petition shows that the contractor had left for the day and the tenants were in sole possession, for the accident happened at nine o'clock in the evening.

Both of these propositions are covered in the opinion in the case of *Shindlebeck v. Moon*, 32 Ohio St., 264 [30 Am. Rep. 584], 274, and in following that authority, the trial judge properly sustained the demurrer.

Judgment affirmed.

**Marvin and Henry, JJ., concur.**



Traction Co. v. Hanson.

### NEGLIGENCE.

[Summit (8th) Circuit Court, October 8, 1908.]

Marvin, Winch and Henry, JJ.

NORTHERN O. TRAC. & L. CO. v. ROSE HANSON.

**Daughter Cannot Testify in Negligence Evidence as to Injury.**

In a personal injury damage case, it is not proper to permit a daughter of the plaintiff to testify that her mother was unable to work after she was injured because she was nervous and her back hurt her.

[Syllabus by the court.]

**ERROR.**

*Rogers, Rowley & Rockwell*, for plaintiff in error.

*A. E. King*, for defendant in error.

**WINCH, J.**

Defendant in error recovered a judgment against plaintiff in error, by the consideration of the common pleas court, assessing her damages at \$2,000 by reason of injuries which she claimed to have received when a car of the traction company in which she was riding as a passenger, jumped the track when going up a hill on a curve.

In this court the right of the plaintiff below to recover is not seriously contested, but it is said that the verdict is excessive; that Mrs. Hanson was not hurt seriously enough to warrant the payment to her of any such sum as the jury awarded her and that the excessive verdict was largely due to the admission of improper evidence.

The evidence with regard to Mrs. Hanson's injuries is conflicting. She had no bones broken, but was somewhat bruised in the accident. She claims, however, and in this she is sustained by her family physician, that she has suffered prostration as a result of the shock she received and is now unable to do her housework because of it. Two reputable physicians testified on the other side that she is not suffering from nervous prostration,

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but has rheumatism and other ailments due to her advancing years. She is sixty-one years old.

With this conflict in the evidence we would not disturb the jury's verdict, though we might ourselves be of the opinion that the sum allowed is too much. A more serious question is presented, however, by rulings of the trial judge on questions asked of Mrs. Hanson's daughter, who testified over the objection of the defendant below, as shown on pages 12, 13 and 14 of the record, as follows:

"You may state whether or not your mother does any ironing since she was hurt? A. She don't do any ironing at all.

"Q. Why?

"Objected to.

"Q. If you know?

"Objected to; objection overruled; defendant excepts.

"A. Because she's nervous.

"Mr. Rodgers: We ask that the answer be excluded.

"The Court: The answer may stand. Defendant excepts.

"Mr. Kling: Q. Is there any other reason why? A. She is unable.

"Q. Is there some other reason why she doesn't do any ironing?

"Objected to; objection overruled; defendant excepts.

"A. Because she's not able to do it.

"Mr. Rodgers: We ask the answer be stricken out.

"The Court: Overruled. Defendant excepts.

"Mr. Kling: Since your mother's injuries does she do any washing?

"Objected to; objection overruled; defendant excepts.

"A. No, sir.

"Q. For what reason doesn't she do any washing?

"Objected to; objection overruled; defendant excepts.

"A. Account of her back; she can't lean over.

"Mr. Rodgers: I ask that the answer be excluded.

"The Court: Overruled. Defendant excepts.

"Mr. Kling: Is there any other reason why she doesn't do any washing?

"Objected to; objection overruled; defendant excepts.

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"A. Because she's nervous.

"Mr. Rodgers: We ask that the answer be stricken out.

"The Court: Overruled. Defendant excepts.

"Mr. Kling: Q. Is there any other reason why she doesn't do any washing?

"Objected to; objection overruled; defendant excepts.

"A. Because she's not able to do it; she's too nervous.

"Q. What do you mean by not able to do it?

"Objected to; objection overruled; defendant excepts.

"A. She's nervous and her back hurts her.

"Mr. Rodgers: We ask that the answer be excluded.

"The Court: It may remain.

"Defendant excepts.

"Q. Since this accident does your mother do any sweeping of the floors?

"Objected to; objection overruled; defendant excepts.

"A. Yes, sir.

"Q. What part? A. Kitchen.

"Q. Any other part of the house? A. No.

"Q. Why doesn't she?

"Objected to; question withdrawn.

"Q. Does your mother do any sweeping since this accident?

"Objected to; objection overruled; defendant excepts.

"A. The kitchen.

"Q. What's the reason your mother doesn't sweep the other rooms?

"Objected to; objection overruled; defendant excepts.

"A. She's so nervous she can't hold the broom in her hands.

"Q. Any other reason? A. She can't stoop.

"Q. Any other reason? A. Her back hurts her.

"Q. You may state whether or not your mother made any complaint of pains at the time she came home and while in bed after this accident?

"Objected to; objection overruled; defendant excepts.

"A. Yes, sir.

"Mr. Rodgers: We ask that the answer be excluded.

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"The Court: It may stand. Defendant excepts."

It was perfectly competent for this witness to say that since the accident her mother had done no ironing, washing or sweeping, but she should not have been permitted to give her opinion as to why her mother didn't do this work. It was also competent for the daughter to testify as to her mother's apparent physical condition and ability to work, but to permit her to give her opinion that her mother couldn't work because she was too nervous was clearly error. Medical experts might possibly be called upon to express an opinion of this kind but only after full statement of the facts upon which they based it.

In this case the rules laid down by the Supreme Court in the case of *Balt. & O. Ry. v. Schultz*, 43 Ohio St., 270, 282 [1 N. E. 324; 54 Am. Rep. 805], regarding the admissibility of the opinions of witnesses, were clearly violated.

The evidence thus admitted was extremely prejudicial to the rights of the defendant below. For error in ruling on evidence the judgment is reversed and the cause remanded for a new trial.

**Marvin and Henry, JJ., concur.**

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**CONTRACTS—DAMAGES.**

[Cuyahoga (8th) Circuit Court, December 28, 1908.]

**Marvin, Winch and Henry, JJ.**

**BETH HAMIBRASH HAGADOL BETH ISRAEL CONGREGATION v. JACOB ETTINGER.**

**1. In Breach of Contract of Employment, Plaintiff's Neglect of Duty not Required to be Wilful.**

In an action of damages for breach of contract of employment where defendant pleads that plaintiff neglected his duty, it is error to charge the jury that plaintiff's neglect of duty, to warrant a discharge, must be wilful. Any neglect of duty, wilful or otherwise, is sufficient, if it tends to prejudice the employer's interests.

**2. Condonation of Breach of Employment Question for Jury.**

Whether failure to discharge plaintiff after he has been guilty of neglect of duty, amounts to a condonation of his failure, is for the jury to say, under all the circumstances of the case.

*Congregation v. Ettinger.***3. Measure of Damage for Breach of Employment Contract.**

The measure of damages for wrongful discharge is the balance due under the contract less the amount the plaintiff earned, or might have earned, upon reasonable efforts to secure other employment, during the remainder of the term. The plaintiff can not remain idle without making any effort to reduce the damages. It is for the jury to say whether, in fact, the plaintiff did make reasonable efforts to obtain other employment.

[Syllabus by the court.]

**ERROR.**

*F. P. Strong and Wm. E. Gunn*, for plaintiff in error.

*Nathan Loeser*, for defendant in error.

**WINCH, J.**

This dispute between a religious congregation and its cantor was aired at too great length in the courts. It is to be hoped that the parties have now worn themselves out and that bitterness and feeling have expended themselves, so that peace and harmony may again prevail. The trial judge is not entirely to blame for the protracted contest which involved the introduction of much irrelevant testimony and too profuse a charge; counsel for both parties are to blame for this result, not only in permitting evidence of collateral matters to be introduced which had no bearing upon the real issue in the case, but also in the requests to charge, which were not sufficiently condemned to meet the simple requirements of the case.

The cantor was discharged before his term of employment was ended. Was there good cause for his discharge, and if not, what was the measure of his damages?

These were the only matters for consideration, supplemented by the rebuttal claim of the plaintiff that the congregation had condoned some of the failures to completely perform his contract.

The bias or prejudice of Bialowski or others of the congregation, or improper motive in the discharge, if any, had no place in the case. We can not reverse the judgment, however, because of the introduction of such evidence, because the record shows that plaintiff in error not only permitted that kind of evidence to be introduced without objection, but went into the matter itself.

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We find prejudicial error in the charge, however, in several respects.

Throughout the charge the court reiterated the statement that the plaintiff's neglect of duty, to warrant a discharge, must be wilful. We do not so understand the law. Any neglect of duty, wilful or otherwise, is sufficient, if it tends to prejudice the employer's interest. *Beckman v. Garrett*, 66 Ohio St. 136 [64 N. E. 62].

Again the charge as to condonation is unfortunate, because obscure. Having properly charged on the subject the trial judge undertook to explain his meaning and seems to say that the mere continuance of the employment, after knowledge of the plaintiff's neglect, would amount to a waiver, and that the defendant would then have to prove that it did not intend condonation. Of course it was for the jury to say what the facts amounted to, and no greater burden was upon the defendant than to explain the delay, if it could.

The charge as to measure of damages was erroneous. The court charged that if the jury found for the plaintiff it should award him the balance due under the contract less such sum as it might find he had earned during the term. This should have been qualified so as to authorize the jury to deduct not only that which the plaintiff had earned, but what he might have earned upon reasonable efforts to secure other employment. The plaintiff can not remain idle without making any effort to reduce the damages to the defendant.

Whether or not he did use reasonable diligence to secure other work should have been left to the jury, under proper instructions.

For error in the charge in the respects stated, the judgment is reversed.

**Marvin and Henry, JJ., concur.**

Bolton v. State.

### WORK AND LABOR.

[Cuyahoga (8th) Circuit Court, January 11, 1909.]

Marvin, Winch and Henry, JJ.

J. W. BOLTON v. STATE.

**Act Regulating Hours of Labor of Girls Constitutional.**

The act of February 28, 1908 (99 O. L., 30), making it unlawful to permit a girl under eighteen years of age to work in a factory more than eight hours in one day, is constitutional.

[Syllabus by the court.]

**ERROR.**

*Hoyt, Dustin & Kelley*, for plaintiff in error.

*Charles P. Hine*, for defendant in error.

**WINCH, J.**

Plaintiff in error was convicted of employing a girl under eighteen years of age and permitting her to work more than eight hours in one day, in the factory of which he was superintendent, contrary to the provisions of the act of February 28, 1908 (99 O. L., 30).

In this court it is claimed that the provision of the law referred to, under which plaintiff in error was convicted, is unconstitutional.

We find nothing upon which to base this claim. The state has plenary power to legislate regarding minors, as wards of the state; they have only such right to contract as the state awards them.

That the provision of the law referred to is a reasonable exercise of the police power of the state is apparent, if it be viewed in its bearing upon the health of immature girls who are to be the future mothers of our citizens. The judgment of the Legislature in this matter is not to be set aside by the courts.

Judgment affirmed.

**Marvin and Henry, JJ.**, concur.

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### **LIBEL AND SLANDER.**

[Cuyahoga (8th) Circuit Court, January 11, 1909.]

Marvin, Winch and Henry, JJ.

**HERMAN PREUSSER v. F. V. FAULHABER.**

**Intentional Fraud Necessary to be Shown in Libel Based on Words Used in Disbarment Proceedings.**

In an action for libel based on words used in papers filed in disbarment proceedings, the petition is demurrable if it fails to allege that the defendant was guilty of intentional falsehood, or that he took advantage of legal proceedings to utter false, malicious and slanderous words.

[Syllabus by the court.]

*Herman Preusser*, for plaintiff in error.

*Mooney & Mahon*, for defendant in error.

#### **WINCH, J.**

It can not be denied that the libelous articles complained of bear internal evidence that they were filed in court by the defendant in disbarment proceedings as charges of unprofessional conduct against the plaintiff.

Whether all statements made by parties and witnesses in court are absolutely privileged, is a question that does not appear to have been squarely decided by the Supreme Court of this state. It was found unnecessary to decide this question in the cases of *Lanning v. Christy*, 30 Ohio St., 115 [27 Am. Rep. 431], and *Liles v. Gaster*, 42 Ohio St., 631. There is an *obiter* in the case of *Post Publishing Co. v. Maloney*, 50 Ohio St., 71 [33 N. E. 921], 84 to the effect that: "In such cases the privilege constitutes an absolute bar to the action."

In this case the petition, to which a demurrer was sustained, contains no allegation that the defendant was guilty of intentional falsehood, or that he took advantage of legal proceedings to utter false, malicious and slanderous words. Such being the case, the inference or presumption of malice that would arise, if the words were not used in a judicial proceeding, is rebutted by that fact. *Liles v. Gaster*, *supra*.

Judgment affirmed.

Marvin, and Henry, JJ., concur.



Forschner v. Mellick.

### VERDICT.

[Cuyahoga (8th) Circuit Court, January 26, 1909.]

Marvin, Winch and Henry, JJ.

FRANK FORSCHNER v. W. C. MELLICK.

**Directing Verdict in Favor Having Burden of Proof Erroneous.**

It is improper to direct a verdict in favor of a party having the burden of proof.

[Syllabus by the court.]

**ERROR.**

*J. H. Saltman*, for plaintiff in error.

*H. G. Schaibley*, for defendant in error.

**WINCH, J.**

We think that the plaintiff in error is properly here complaining of the error which was committed by the trial judge. That error consisted in the trial judge directing a verdict in favor of the plaintiff below. There were at least some issues on which the plaintiff below had the burden of proof. If I recollect correctly, there have been former decisions of this court, the titles of which I do not now remember, wherein has been adjudicated the question here presented, and we are inclined to hold to our former decisions, to the effect that it is improper to direct a verdict in favor of anybody having the burden of proof.

Now one of the issues of the case raised by the inquiry of the defendant below was whether the plaintiff was a sub-contractor; whether W. C. Mellick had a contract with the city. In that event the burden was upon Mellick to prove that the contract was with him rather than with this partnership, and when the trial court was asked to direct a verdict in his favor without any attempt on his part to prove whether or not he had a contract with the city, it committed error. Evidence should have been admitted on that point and the trial judge should have left that question to the jury to determine. It may be true that the burden was upon the defendant below to file his claim and

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file notice with the city, and he may not have introduced any evidence on the subject. You may be correct on that issue: but the trial judge could not direct a verdict for the plaintiff when the burden was upon you to prove that you were the contractor, and for this error the judgment must be reversed.

**Marvin and Henry, JJ., concur.**

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**INJUNCTION—RESTRAINT OF TRADE.**

[Cuyahoga (8th) Circuit Court, December 28, 1908.]

**Marvin, Winch and Henry, JJ.**

**LEWIS T. SCHROEDER ET AL. V. HARRY SCHULTZ ET AL.**

**1. Contracts in Partial Restraint of Trade Strictly Construed Enforced Only when Plain Violation Appears.**

Contracts in restraint of trade, though the restraint is partial only, are not looked upon with favor, are strictly construed and are enforced only in clear cases, where material damage to the plaintiff is apparent and no irrevocable hardship will result to the defendant and others.

**2. Son Agreeing not to Engage in Named Business not Enjoinable from Assisting Father in Same Line of Business.**

One who has agreed not to start in the express and moving business within a certain territory for five years, will not be enjoined from taking care of horses and driving them for his father, who is engaged in said business within the forbidden territory, even though the evidence shows he has solicited one order for business for his father within said territory.

[Syllabus by the court.]

**APPEAL.**

*E. C. Schwan*, for plaintiff.

*Willis Vickery*, for defendant.

**WINCH, J.**

The prayer of the petition in this case is for an injunction to prevent the defendants from carrying on the moving, expressing and cartage business within a radius of two miles of the corner of Superior avenue and Addison road, N. E., in the city of Cleveland, Cuyahoga county, Ohio. The covenant upon which this action is based is contained in a bill of sale of certain vans,

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wagons and teams from the defendants to plaintiffs, expressed in the following language:

"It is also agreed that for a consideration of said seven hundred dollars, I, Harry Schultz, agree not to start in the express and moving business for a term of five years, within two miles of the corner of Superior avenue and Addison road, N. E."

Upon the hearing we found the fact to be, and so announced, that the business complained of within the forbidden territory is owned and carried on by the father of the defendant, Harry Schultz. Harry is working for his father, taking care of his teams and wagons, driving, and, in one instance, has solicited an order within the forbidden territory.

Contracts even in partial restraint of trade are not looked upon with favor, are strictly construed and enforced only in clear cases, where material damage to the plaintiff is apparent and no irrevocable hardship will result to the defendant and others. *Harkinson's Appeal*, 78 Pa. St., 196 (21 Am. Rep., 9).

Under a strict construction of the clause of the contract quoted, defendants have not started in the express or moving business. The only feature of what Harry has done which might be so construed is his soliciting one order within the forbidden territory. There is nothing in the contract to forbid his taking care of horses and driving them, even though they be used in said business. Soliciting orders has been held to be no violation of an agreement not to carry on a certain business within certain limits, the question of whether this constitutes a breach of the contract being regarded as too doubtful. *Turner v. Evans*, 2 De Gex, M. & G., 740.

No material damage to plaintiff was shown in this case, but the situation of defendant's father is such, at this time, that we think he would be put to great inconvenience if deprived of his son's services. The son, too, should be permitted to earn an honest livelihood. We think there was no desire on his part to violate his agreement; if he was morally wrong in soliciting said order, it was a mistake or misconception of his duty, and not an intentional violation of his contract.

The current of authorities in this country and England seems to be against enforcing a contract such as we have here,

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to the extent of preventing the defendant from working for others in a similar business, unless the contract so specifies.

Because plaintiff's right is doubtful and little harm to him is shown, we decline to grant him the extraordinary relief of an injunction.

Petition is dismissed.

**Marvin and Henry, JJ., concur.**

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**ASSIGNMENTS—CREDITOR'S BILL.**

[Summit (8th) Circuit Court, October 8, 1908.]

**Marvin, Winch and Henry, JJ.**

**AKRON BLDG. & LOAN ASSN. v. FOLTZ.**

**1. Issue Raised by Third party Intervening on Creditor's Bill and Claiming the Fund, Triable without Presence of Debtor.**

In an action in the nature of a creditor's bill to subject a debtor's interest in an estate to the payment of a dormant judgment, where a third person intervenes and by cross-petition claims an assignment to himself of all the debtor's interest in the estate, and the plaintiff answers this cross-petition, alleging fraud in such assignment, the issue thus raised between the plaintiff and the debtor's assignee can be litigated, even without proper service upon the debtor assignee.

**2. Assignment for Support of Creditor for Life in Fraud of Creditors.**

Where the only consideration for the assignment of a debtor's interest in an estate is the agreement of the assignee to support the assignor for the remainder of her life, the transaction can not stand at the expense of the assignor's creditors; she must pay her creditors before she provides for her own future.

[Syllabus by the court.]

**APPEAL.**

**WINCH, J.**

On February 4, 1907, the plaintiff brought its action in the nature of a creditor's bill against the defendants, Kent O. Foltz, Birdie A. Foltz and the executors of the estate of Joy H. Pendleton, deceased, to subject the interest of said Birdie A. Foltz in said estate to the payment of a dormant judgment which it held against her and her husband. Service on said petition was had on the defendant executors and the husband, Kent, but Birdie was not found. Service on her by publication was

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attempted by notice published once a week for six weeks in the Akron Times, beginning August 2, 1907. This notice contained a short statement of the allegations and prayer of the petition.

Meanwhile, on June 3, 1907, Birdie had assigned all her interest in said estate to her brother, Frank W. Rockwell, in consideration of the payment to her by him of \$2,000 in cash and the further consideration of the promise and agreement of the said Frank W. Rockwell to provide her with a home and reasonable maintenance and wearing apparel for the rest of her life.

On October 29, 1907, on his own motion, said Frank W. Rockwell was made a party defendant to the cause with leave to file an answer and cross-petition, which he did on November 4th, 1907, and in it, by denial, raised an issue as to plaintiff's rights under its alleged judgment. In his cross-petition he set up said assignment to him of Birdie's interest in the Pendleton estate, and alleged that he took and received the same in absolute good faith, and that the executors of said estate had paid over to him all of Birdie's interest therein except \$1,500. The prayer of this cross-petition is that the petition be dismissed, that the executors be ordered to pay over said \$1,500 to him, and that he be confirmed in his ownership of Birdie's interest in said estate, free of any claim of plaintiff's.

On March 30, 1908, the plaintiff filed its amended answer to this cross-petition of Rockwell, alleging that the assignment to him by Birdie Foltz of her interest in the Pendleton estate was in fraud of her creditors, and asking that the same be set aside and that said funds so assigned to Rockwell be applied in satisfaction of its claim. June 20, 1908, Rockwell replied to this amended answer of plaintiff's putting in issue the good faith of the transaction between him and his sister Birdie. Other pleadings were filed by and against the defendant executors and certain motions and demurrers were filed in the cause, which, in the view we take of it, it is unnecessary to mention.

The case was finally tried in the common pleas court and judgment being rendered there against the plaintiff, the case is properly here on appeal.

We think that the issue now presented for the determination of this court is the one raised by the cross-petition of defendant,

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Frank W. Rockwell, the amended answer thereto of the plaintiff, and the reply of defendant, Rockwell. This issue is as to the good faith of the transaction between Rockwell and his sister Birdie. The action thus presented is one of a creditor to set aside a fraudulent transfer of his debtor's property. We deem it immaterial and unnecessary to determine whether, or not the original issue tendered by the petition could be prosecuted without service upon Birdie Foltz other than that shown by the publication of notice referred to and whether that petition is insufficient in that it fails to allege an unsatisfied execution upon a living judgment against said Birdie Foltz.

A more serious question, and one which we resolve in favor of the plaintiff with considerable doubt, is whether Birdie Foltz is a necessary party to the issues now pending between the defendant Rockwell and plaintiff. We hold that the published notice is insufficient to charge her with notice of this issue. But we have concluded that the case as it now stands can be tried, though she may not be bound by its results. Whether or not the grantee in an alleged fraudulent conveyance is a necessary party to proceedings by a creditor to set it aside is a question as to which the adjudications do not agree (20 Cyc. 711); but we hold that where the grantee of such conveyance is a party and alleges that the entire interest of his grantor in the property transferred has been conveyed to him, a full determination of his rights may be had without the presence of his grantor in the suit, *Wait, Fraud. Conveyances*, Sec. 129. If the grantee under the alleged fraudulent conveyance wants an adjudication as between himself and his grantor, let him bring his grantor into the case. It is also immaterial whether plaintiff's claim is reduced to judgment or not. *Combs v. Watson*, 32 Ohio St., 228.

Having resolved these questions in favor of the plaintiff the only matter left for consideration is whether this transfer by Birdie to her brother Frank of all her interest in the Pendleton estate should stand as against the claims of her creditors. It appears from the evidence that for the consideration of \$2,000 and an agreement to support his sister for the remainder of her life, Frank W. Rockwell has received from the Pendleton executors, or is entitled to receive, over \$18,000. However laudable it may be for him to provide for his sister, and however nearly

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commensurate with his undertaking this compensation may be, the transaction can not stand at the expense of Birdie's creditors. She must pay her creditors before she provides for her own future. Rockwell knew all about the claims of plaintiff when he took the assignment from her and that by it she divested herself of all her property, which otherwise might go to pay her creditors. The authorities are agreed upon this proposition. It is well stated in the case of *Egery v. Johnson*, 70 Me., 258.

The prayer of plaintiff's amended answer to defendant Rockwell's cross-petition is, therefore, granted. Decree may be drawn accordingly.

Plaintiff having predicated error to the same judgment of the court of common pleas herein appealed from, as appears by case No. 856 in this court, the appeal being sustained, it follows that the error case must be dismissed for want of jurisdiction.

**Marvin and Henry, JJ., concur.**

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**COUNTERCLAIM AND SET-OFF.**

[Cuyahoga (8th) Circuit Court, October 19, 1908.]

**Marvin, Winch and Henry, JJ.**

**WILLIAM J. STANFIELD v. L. T. ROSSOW ET AL.**

**Verdict Finding Defendant's Damages Counter-Balance Plaintiff's Claim Upheld.**

In an action on a building contract with cross petition of defendant for damages resulting from poor work, a verdict in the following form will not be set aside as irregular: "We, the jury being duly sworn, do find that there is due to the plaintiff on the claim in his petition set forth, the sum of \$430, and we find that there is due to the defendants on the counterclaim set forth in their cross petition, the sum of \$430. We, therefore, find a balance in favor of the defendants in the sum of \$00.00."

[Syllabus by the court.]

**ERROR.**

*White, Johnson, McCaslin & Cannon*, for plaintiff in error.  
*Bemis & Calfee*, for defendants in error.

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**WINCH, J.**

Plaintiff in error was plaintiff below and brought his action against the defendants to recover the balance he claimed due him on a building contract. The defendants answered alleging that the contract had not been complied with in all its terms and claiming damages for poor work. The case was properly submitted to the jury which brought in a general verdict for the defendants, but in that verdict attempted to state the manner in which it arrived at its conclusions. The verdict reads:

"We, the jury, being duly sworn, do find that there is due to the plaintiff on the claim in his petition set forth the sum of four hundred and thirty dollars, and we find that there is due to the defendants on the counterclaim set forth in their cross petition, the sum of four hundred and thirty dollars. We, therefore, find a balance in favor of the defendants in the sum of \$00.00."

The plaintiff claims that since he is suing upon a contract he was entitled to the amount due him thereon, with interest from the day it became due, and that defendant was entitled to a finding of a lump sum as damages, without interest, though interest might be considered in estimating said damages.

In other words, he says that the sums found due plaintiff and defendant, respectively, must be presumed to include interest upon their several demands, but that the sum found due plaintiff, being the exact balance claimed by him under his contract, without interest, is manifestly too small by about \$75.

Conceding the logic of this argument, we nevertheless affirm the judgment, for it is perfectly apparent that the jury intended to determine that the defendant's damages exactly counter-balanced the plaintiff's claim, and this the evidence in the case warranted. They did not give the defendant all he claimed, any more than they did the plaintiff, but they did find, upon sufficient evidence and under a charge which is not challenged, that the defendant was not indebted to the plaintiff. This finding should not be disturbed.

Judgment affirmed.

**Marvin and Henry, JJ., concur.**



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**CRIMINAL LAW—VENUE.**

[Cuyahoga (8th) Circuit Court, February 17, 1908.]

Marvin, Winch and Henry, JJ.

JOSEPH NOONAN V. STATE OF OHIO.

**Proper Venue Required Shown to Convict for Failure to Properly Provide for Child.**

In order to convict for failure to furnish necessary and proper food, clothing and shelter for a child, the state must show that the offense was committed within the county where the trial was had.

[Syllabus by the court.]

ERROR.

*Philip E. Hintz*, for plaintiff in error.

*Frank E. Stevens*, for defendant in error.

**WINCH, J.**

Plaintiff in error was convicted in the police court of the city of Cleveland of an offense commonly known as neglecting children, the punishment for which is provided by Sec. 6984a R. S. (Sec. 12970 G. C.). His conviction was affirmed by the common pleas court.

The affidavit filed in the case alleges that the offense was committed "on or about August 17, A. D. 1906 (the date of the affidavit), and from January 14, A. D. 1905 (the date of the child's birth), until said August 17, A. D. 1906, at said city and county."

The statute requires the state to show that the accused "wilfully, unlawfully or negligently fails to furnish necessary and proper food, clothing, or shelter for such child."

The bill of exceptions shows that the child was born in Cleveland, but later taken by its mother to her parents "on a farm" where it has since remained, cared for by them, with some little help from the mother. The child is well taken care of, but plaintiff in error has never contributed to its support.

Where the farm is, is not shown. It does not appear that it is even in the state of Ohio or the United States. It may be in

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Canada, for aught the record shows, and on that farm the child has been ever since its mother took it there, about February, 1906.

It was further developed upon cross-examination of the mother that when she first asked the accused to give her something for the support of the child, it, the child, was with her parents.

In this state of the record we are compelled to say that the state failed to show that the offense was committed within the jurisdiction of the police court of the city of Cleveland and for that reason, the judgment not being sustained by sufficient evidence, the judgments of the common pleas court and the said police court are reversed and the cause remanded for a new trial.

**Marvin and Henry, JJ., concur.**

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**INNKEEPERS.**

[Cuyahoga (8th) Circuit Court, April 1907.]

**Marvin, Winch and Henry, JJ.**

**EDMUND HUGHES v. LEONARD W. CRAWFORD.**

**Mutual Liability of Boardinghouse Keeper for Property of Boarder.**

A boarder, as well as his boardinghouse keeper, is required to exercise ordinary care of property left in his room which may attract thieves.

[Syllabus by the court.]

**WINCH, J.**

Plaintiff was a boarder in the house of defendant, who kept a few boarders. One morning plaintiff left his watch in his room and his purse with some money in it in his clothes hanging up in his closet, and went to his work.

There was no lock on the door of plaintiff's room.

Sometime that day another man applied for board and was assigned a room near plaintiff's in which he remained several hours. A lady member of the family having occasion to use the new boarder's room, asked him to step into plaintiff's room

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temporarily, which he did, afterwards leaving the house and never returning. When plaintiff came home at night his watch and purse were gone. He brought his action against the boarding house keeper to recover their value. The trial judge directed a verdict for the defendant and the case is now here for review.

Conceding that boardinghouse keepers are bound to exercise ordinary care of the property of boarders left in their rooms of which the former have a certain supervision and control, and that the degree of ordinary care is not that degree of care as is demanded of an ordinarily prudent man under similar circumstances, there was enough evidence in this case to go to the jury, unless the plaintiff himself was so careless and negligent regarding his own property, that a verdict was rightly directly against him.

On this point it appears that plaintiff knew that defendant was accustomed to admit strangers to his house as boarders without inquiry concerning them, for he had been so admitted himself. He knew there was no lock on his door; he knew the family and others in the house could and did make some use of his room, or at least, had free access to his room. Knowing all this he deliberately left his watch in plain view in his room, and this, the evidence shows, he was accustomed to do. Leaving such small objects of value in plain sight, unprotected, we think was not such care of his own property as plaintiff should have taken of it. It created a temptation of theft.

As there was no evidence in the case tending to show that any member of defendant's family took the watch and purse, we think the judgment was properly against the plaintiff and it is affirmed.

**Marvin and Henry, JJ., concur.**

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**INSURANCE.**

[Cuyahoga (8th) Circuit Court, April, 1907.]

Marvin, Winch and Henry, JJ.

CONTINENTAL CASUALTY CO. v. VERNIE-JOHNSON.

**Waiver of Condition of Health Policy must be Plead.**

Where one of the conditions of a health policy was that premiums should be paid on the first day of each and every month in advance, to entitle the policy holder to prove a waiver of this condition he must plead it.

[Syllabus by the court.]

**WINCH, J.**

The judgment in this case seems to be warranted by the facts, if they were properly before the court, but a reversal is required because one of the technical rules of pleading was violated.

It is confessedly better that salutary general rules should be universally applied than that an occasional violation of them should be permitted in particular cases.

Vernie Johnson brought his action to recover on a policy of health insurance. In his petition, among other things, he alleged that he "well and truly kept and performed all the conditions of said policy on his part to be performed."

The company's answer traversed this allegation.

The policy provided that the insured should pay the company the required premium on or before the first day of each and every month, in advance, during the life of the policy, that the insurance should continue in force only so long as the premiums should be paid as required on or before the first day of each month, in advance, without notice, and—

"That the acceptance of any past due or delinquent premium is optional with the company, and shall not in any case be a waiver of the forfeiture of this policy, but shall be continuous and have the same effect as if a new application in the same terms as the last preceding one were then made and a new policy subject to the warranties and agreements of such new application, issued at 12 o'clock noon, standard time, on the day following such acceptance of such past due premiums, and that for

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the payment and remittance of such past due premiums the insured constitutes the local treasurer his agent."

At the hearing it was conceded that the insured did not pay the last premium due before he was taken sick, until six days after the first of the month.

The insured thereupon undertook to show that he was prevented from making said payment by the negligent acts of the company and that they received said premium without objection, though paid six days late. This evidence was admitted over the objection of the company. While we think the evidence thus admitted conclusively shows that the company waived the forfeiture and the printed conditions of its policy with reference thereto, still we are constrained to hold that the court erred in admitting such evidence. The issue thus raised was not raised by the pleadings.

For condoning the error here complained of this court was reversed in the case of *Eureka Fire & Marine Ins. Co. v. Baldwin*, 62 Ohio St. 368, [57 N. E. Rep. 57], so we feel disposed to apply the law of that case here, though the delicacy of counsel withheld its citation to us.

The syllabus of the case referred to reads as follows:

"Where a party avers that he has performed all the conditions of a contract to be by him performed, his proof upon the trial must show such performance in order to entitle him to a recovery. Under such an averment it is not competent to prove a waiver of such conditions. If the waiver of conditions is relied upon, such waiver must be averred in the pleadings."

For error in the admission of evidence the judgment is reversed and the same is remanded for a new trial.

**Marvin and Henry, JJ., concur.**

## Cuyahoga County Circuit.

**DEATH—HUSBAND AND WIFE.**

[Cuyahoga (8th) Circuit Court, April, 1907.]

Marvin, Winch and Henry, JJ.

JOHN W. CLAWSON, ADMR. v. SAMUEL BRIGGS.

**Estate of Married Woman Liable for Her Funeral Expenses.**

The estate of a married woman, who dies leaving property, is primarily liable for her funeral expenses, and where the husband pays them he may recover them from her administrator.

[Syllabus by the court.]

**WINCH, J.**

In this case we hold that in Ohio the estate of a married woman, who dies leaving property, is primarily liable for her funeral expenses, and, where the husband pays them, he may recover them from her administrator.

We follow the reasoning of the opinion, of Holmes, J., in *Constantinides v. Walsh*, 146 Mass. 281 [15 N. E. Rep. 631; 4 Am. St. Rep. 311].

The common pleas court being of the same opinion, its judgment is affirmed.

**Marvin and Henry, JJ., concur.**

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**STREET RAILWAYS.**

[Cuyahoga (8th) Circuit Court, February 5, 1912.]

Marvin, Winch and Niman, JJ.

**ANGELA M. HARRIS v. CLEVELAND ELECTRIC RAILWAY.****1. Street Car no Greater Right on Street than Pedestrian or Vehicle which Motorman Must Observe.**

A street car company has only equal rights with the driver of a horse, or a pedestrian, at a street crossing, and therefore it is the duty of the motorman as he approaches a street crossing, to have his car under control and to keep a constant lookout, not only ahead, but also to the right and left, so as to discover persons upon the track or approaching it without noticing or heeding the approaching car, so that he may allow them to pass over in safety.

**Harris v. Railway.****2. Motorman Cannot Excuse Failure to See Person in Danger Unless Duty Calls His Attention Away.**

A motorman can excuse himself for not seeing a person in danger at a crossing when in the exercise of proper care he ought to have seen him, only by showing that at the moment, his attention was attracted by some other matter in the line of his duty.

**3. Duty of Motorman Requires Effort to Save Driver of Horse Running Away.**

Although plaintiff's horse was running away and she could not control it, yet if the motorman saw her and could have slowed up sufficiently to let her pass, it was his duty to do so, and if he failed in this duty, that failure was the proximate cause of the accident.

[Syllabus by the court.]

**ERROR.**

*A. Lawrence and H. F. Payer*, for plaintiff in error.  
*Squire, Sanders & Dempsey*, for defendant in error.

**WINCH, J.**

This was a personal injury damage case, verdict for the defendant being directed at the close of plaintiff's evidence.

The accident happened at the junction of Riverside avenue with Detroit avenue, in the city of Lakewood, toward the close of the afternoon of October 12, 1906. The plaintiff was driving northerly on Riverside avenue, when her horse became unmanageable and ran away with her. As she approached Detroit avenue she saw a car of the defendant company approaching from the east at a high rate of speed and realized that she was apt to be struck by it, unless it slackened its speed. She held tightly onto the lines and managed to turn her horse toward the west at the corner and had got about fifteen or twenty feet from the corner when the car struck both the horse and buggy on their right side and she was thrown out and seriously injured.

There was evidence tending to show that there was a view across the corner from a point on Detroit avenue 250 feet east of Riverside avenue to a point on Riverside avenue 150 feet south of Detroit avenue, unobstructed except by a small office building directly at the corner.

The plaintiff testified:

"I could see the Detroit avenue car approaching, and I screamed to warn the motorman that I could not help myself,

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I first saw the Detroit avenue car when I was about one hundred and fifty feet from the corner. The car was about two hundred and fifty feet away, if not more. There was nothing by which my view was obstructed. I looked at the motorman in charge of the car, and he was looking at me. I could see across the corner there. He was facing towards me. I tried to hold my horse and I could not, so I tried to warn the motorman of my condition so that he would give me time to pass. I tried to stop the horse and when I could not, of course, the only place for me to turn was west. I turned the corner just as sharp as I could, say about fifteen or twenty feet, when the car struck me."

Two passengers on the car testified that at a point 200 feet before the car reached Riverside avenue they saw the horse running away and unmanageable, when it was at a point 150 feet south of Detroit avenue. One of them rang the bell when the car was 100 feet from Riverside avenue, but the motorman did not slacken the speed of the car, which was running at a rate of from twenty-five to thirty miles an hour.

There was no evidence introduced to show within what distance a car running at that rate of speed might be stopped.

The plaintiff claimed that the accident was due to the excessive rate of speed at which the car was running, the neglect of the motorman to have it under control as he approached the crossing and his negligence in not noticing her danger in time to save her.

It is said that the trial judge took the case from the jury because he thought the running away of the horse and not the high rate of speed and negligence of the motorman, was the proximate cause of the injury.

It is well settled law, in this state at least, that a street car company has only equal rights with the driver of a horse, or a pedestrian, at a street crossing, and therefore it is the duty of the motorman as he approaches a street crossing, to have his car under control and to keep a constant lookout, not only ahead but also to the right and left so as to discover persons upon the track or approaching it without noticing or heeding the approaching car, so that he may allow them to pass over in safety.



*Harris v. Railway.*

Thus, it was held in the case of *Toledo Street Ry. v. Westenhuber*, 12 Circ. Dec. 22 (22 R. 67), that:

"It is negligence in the motorman of an electric street car. when the car is from 150 to 200 feet from a street crossing and he sees a wagon about to cross the track, not to try to stop or slacken the speed of the car until almost at the crossing when, by so doing, the collision which ensued might have been avoided."

This case was affirmed by the Supreme Court, no op., in *Toledo Street Ry. v. Westenhuber*, 65 Ohio St. 567.

In the same case it was said:

"If the driver could go upon and move more than half over the crossing before the arrival of the car, when the car was going at full speed, obviously the car might have been controlled by the motorman, so that the driver could have passed entirely over without a collision."

So here, though there was no evidence as to the distance within which a car going at the rate of twenty-five to thirty miles an hour could be stopped, yet, as the horse got fifteen to twenty feet to the west of the crossing before the car struck the front wheel of the buggy, obviously the collision would not have occurred if the motorman had slowed up his speed the least appreciable amount. It took no expert testimony to advise the jury of this fact. Any person of ordinary intelligence can figure it out.

While there was evidence introduced by the plaintiff showing that the motorman actually saw her and her danger in plenty of time to avert the collision, for she says she saw him looking at her, still it would be sufficient if her evidence merely tended to prove that, in the exercise of care commensurate to the occasion, he ought to have seen her, and the evidence of the two passengers, as well as her own tends to prove that.

The rule, as understood and several times applied by this court, is that the motorman can excuse himself for not seeing the person in danger at a crossing when, in the exercise of proper care he ought to have seen him, only by showing that at the moment, his attention was attracted by some other matter in the line of his duty.

It would seem, therefore, that the plaintiff introduced evi-

## Cuyahoga County Circuit.

dence tending to show negligence on the part of the motorman. Was that negligence the proximate cause of the accident?

Although the plaintiff's horse was running away, and she could not control it, the collision was not inevitable if the motorman saw her and could have slowed up sufficiently to let her pass. It was then his duty to slow up, and if he failed in this duty, that failure of duty would be the proximate cause of the accident.

The same is true though he did not see her, if, under the circumstances, in the performance of his duty to keep a lookout, he failed to see what he ought to have seen.

So, too, his negligence is not less, but greater, if his car was running at an excessive rate of speed and was not under control.

As tending to show that a speed of from twenty-five to thirty miles an hour is excessive speed at this place, the ordinance of the city of Lakewood, limiting the speed of such cars to eighteen miles an hour, was introduced. This was some evidence to be considered in determining the defendant's liability. "It served to give character to the act causing the injury." *Meek v. Pennsylvania Co.* 38 Ohio St. 632.

There was sufficient evidence in this case to go to the jury and put the defendant upon its defense.

For error in directing a verdict for the defendant, the judgment is reversed and the cause remanded for further proceedings.

Marvin and Niman, JJ., concur.

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### DESCENT AND DISTRIBUTION.

[Licking (5th) Court of Appeals, April Term, 1914.]

Voorhees, Shields and Powell, JJ.

GILBERT B. GOFF v. JAMES K. MOORE.

Term, Intestate, not Personal in Application, but Applies to Property Descended and not by Will.

The relic of a deceased husband or wife, who leaves a will bequeathing a life estate only, permitting the fee to go where the statute sends it, dies intestate as to real estate inherited from such deceased husband or wife, and in consequence the title to such real estate passes under the provisions of Sec. 8577 G. C., and not under Sec. 8574.

[Syllabus by the court.]

#### APPEAL.

*A. A. Stasel*, for plaintiff.

*Flory & Flory* and *Kibler & Kibler*, for defendant.

#### POWELL, J.

So much of the facts in this case as are necessary to understand the issue involved are as follows:

Abner Goff died in 1896, intestate and without issue, leaving Martha Goff, his widow, surviving him. She was his sole heir at law. At his death he was seized in fee simple of 162 acres of land in this county, which is the subject of this controversy. Martha Goff, his widow, died in May, 1907, seized of the real estate which had descended to her from her said husband, Abner Goff. Martha Goff left a will, by the terms of which she gave a life estate in said lands to her brother, Ensley Finney Haas, but made no disposition of the remainder in said lands after the termination of said life estate. The item of the will of Martha Goff disposing of said real estate is as follows:

"First: I give and devise to my brother, Ensley Finney Haas, to have and to hold during his natural life, all of the farm with its appurtenances which was owned by my husband, Abner Goff, at the time of his death, and of which I became seized as his widow, consisting of 162 acres, more or less, and situated in Washington township, Licking county, Ohio."

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There is no other reference in her will to this real estate. Ensley Finney Haas was the sole heir at law of Martha Goff, and he died shortly after the death of his sister, Martha Goff, leaving a will by the terms of which he gave the residuum of his estate to the defendant, Allen B. Gregg. This action is for partition of the lands described, and being the 162 acres mentioned above. An issue was made by the pleadings as to the descent of the title to this land from Martha Goff, and this is the question to be determined in this action.

Martha Goff took title to this land by virtue of Sec. 8574 G. C. At her death intestate and without issue, it would pass one-half to her brothers and sisters, and one-half to the brothers and sisters of her deceased husband, Abner Goff. If she should dispose of it by will or deed, of course, it would descend according to the terms of such deed or will. This, however, she did not do. The question peculiar to the case is whether or not Martha Goff died intestate, or testate, so as to control the descent of this land from her. It is conceded that in either event one-half of the land would descend to her brother, Ensley Finney Haas, he being her sole heir at law, and the same would pass under his will to the defendant, Allen B. Gregg. But what of the other one-half? She died leaving a will, but she did not dispose of the fee of this land in her said will. If she died intestate, the second half of this land would pass to and vest in the brothers and sisters of Abner Goff, deceased, under Sec. 8577 G. C. If she died testate, the land would not pass under Sec. 8577 at all, but according to the terms of her said will. If she died testate, but without disposing of said lands in her said will, it is claimed that they would pass, not under Sec. 8577, but under Sec. 8574, to which it is held Sec. 8577 is supplementary. If said lands passed from Martha Goff under Sec. 8574, the whole of said lands would descend to her brother, Ensley Finney Haas, and no part thereof would pass to the brothers and sisters of her deceased husband, Abner Goff. But is this the true construction of said sections, or the true construction to be given to the words "die intestate," as used in Sec. 8577? This court is of the opinion that such is not the true construction to be given to these words. The word "intestate," as used in Sec. 8577, does not apply to the person alone,

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but to the property of which such person may die seized. Martha Goff died testate; that is, she died leaving a last will and testament, which was afterwards duly admitted to probate and record in the probate court of this county. She also died intestate as to the fee in this 162 acres of land, which had descended to her from her deceased husband. The word "intestate" not only applies to a person dying without a will, but applies also to any property which descends under and by virtue of the statutes and not by the terms of any last will and testament.

It is the opinion of the court that Martha Goff died intestate as to the real estate which she inherited from her husband, and that the title to such real estate would pass and descend in accordance with the terms and provisions of Sec. 8577, and not according to the terms and provisions of Sec. 8574. Or, in other words, the one-half of this land will pass and descend as intestate property to the brothers and sisters of said Abner Goff, deceased, or to their legal representatives and a partition of the same will be ordered as prayed for by them.

The cause will be remanded to the court of common pleas to carry this order of partition into effect.

**Voorhees and Shields, JJ., concur.**

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**DEATH—NEGLIGENCE.**

[Hamilton (1st) Court of Appeals, July 14, 1916.]

**Jones, Jones and Gorman, JJ.**

**\*NEAVE BUILDING CO. v. WILLIAM A. ROUDEBUSH, ADMR.**

**1. Death Resulting Directly and Proximately from Violation of Municipal Ordinance is Negligence Per Se.**

In an action for damages on account of death by wrongful act, the trial court is warranted in charging that if the direct and proximate cause of the injury was the violation of a valid municipal ordinance the defendant would be guilty of negligence per se.

**2. Window Washer Ordered to Wash Windows Against Protest Because of Ice on Sills.**

A reviewing court will not reverse a judgment finding the defendant liable for the death of the intestate, when there is evidence tending to show, and which the jury evidently accepts as true,

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**\*Affirmed Neave Bldg. Co. v. Roudebush, 96 Ohio St., 000; 62 Bull. Supp. 208.**

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that the intestate, a window washer in an office building, protested against washing the windows while there was snow on the sills, but was told by the superintendent of the building that the windows must be washed.

## ERROR.

*C. D. Robertson* and *B. S. Oppenheimer*, for plaintiff in error.

*Louis B. Sawyer*, *Wm. A. Roudebush* and *George W. Welch*, for defendant in error.

## JONES (E. H.), J.

This is a proceeding in error brought to reverse the judgment of the common pleas court. It is the second time the case has been in this court. It was originally brought for damages on account of the death of Clarence Henson, who was a window cleaner, and who, it is alleged, met his death on January 6, 1911, by falling out of a third-story window in the Neave Building in Cincinnati, Ohio.

The petition alleges that while engaged in his employment as a window cleaner he fell to the ground, and that his fall was due to the negligence of the Neave Building Company in three particulars: first, in not providing some suitable safety device, as required by the following ordinance of the city of Cincinnati:

"In every fireproof or semi-fireproof building now in existence or hereafter erected, every window above the second story thereof shall be equipped with a suitable device which will permit the cleaning of the exterior of such windows without endangering life and limb. Provided, however, that such device need not be placed on any window that can be easily cleaned from within."

Second, that the defendant was negligent in ordering plaintiff to proceed to wash the windows, after he had complained that there was snow on the window sills which made it dangerous for him to do so. And, third, that his employer did not provide sufficient help for him, so as to give him sufficient time to safely clean his windows.

At the trial now under review the chief controversy seems to have been over the question as to whether or not the ordinance above quoted had been complied with. In this connection we

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may say that we think that there was no error on the part of the trial court in charging that the violation of this ordinance on the part of the Neave Building Company would constitute negligence *per se*. This was the theory upon which the plaintiff evidently relied, and which the trial court adopted. If the special charge which the court gave at the request of plaintiff, to the effect that the violation of the ordinance was negligence, was in itself wrong, then of course the whole case falls.

After careful consideration we are of the opinion that the charge given upon this point was in accord with the recent decision of our Supreme Court in the case of *Schell v. Dubois*, 94 Ohio St. 93 [— N. E. —], decided March 3, 1916. The second paragraph of the syllabus of the case just referred to is as follows:

“The violation of a municipal ordinance passed in the proper exercise of the police power in the interest of public safety and not in conflict with general laws, is negligence in itself, and where such act of negligence by a defendant is the direct and proximate cause of an injury not contributed to by want of due care on the part of the injured person, the defendant is liable.”

The court having charged upon this breach of the case correctly as we think, it remained for the jury to decide whether or not the ordinance had been observed by the employer in this particular case. And this question in turn involved other questions of fact the determination of which was exclusively within the province of the jury. The jury having returned a verdict in favor of the plaintiff, it necessarily follows that they found that the windows in the Neave Building were not easily cleaned from within, and that the device known as “Exhibit No. 3” in this record was not a suitable one.

These, together with the question of proximate cause, were the main questions of fact to which the evidence adduced at the trial was addressed. The general verdict of the jury was, as we think, reinforced by the answers to certain interrogatories propounded by both sides. Upon these questions it can not be said with any degree of sincerity that there is no evidence in the record to support the verdict of the jury.

It is claimed that the superintendent of the Neave Build-

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ing asked Mr. Henson, at the time he employed him, whether or not he wanted to use a safety belt, or the safety device above referred to, and that Henson replied in the negative. If, however, the ordinance had not been observed by providing a suitable safety device, the answer of Mr. Henson thus given would in no wise excuse the violation of the ordinance, nor would it change the rule as announced by our Supreme Court, that its violation constituted negligence *per se*.

The evidence of the superintendent of the building, found on page 96 of the record, shows that Henson, when he fell, was engaged in washing the window in Room 203 of the third floor of the Neave Building, and his evidence together with that of Beimesch supply a want of evidence which this court found to exist when a judgment in favor of the administrator, in this case, was some time ago reversed.

There is evidence, also, to show that Mr. Henson complained that the snow on the window sills at that time made it dangerous for him to attempt to clean the windows and that he was told by the superintendent that the windows had to be cleaned anyway. We fail to find anything in the charge of the court touching upon these allegations of the petition or the evidence in support thereof. There was no complaint from either side about this omission, which was not prejudicial to plaintiff in error.

It having been proven to the satisfaction of the jury that Henson met his death as alleged in the petition, by falling out of the window while engaged in his work, we are of the opinion that this evidence is entitled to weight, and to be considered as additional support for the verdict of the jury and the judgment rendered thereon.

There is a conflict in the evidence with reference to the devices, Exhibits Nos. 3, 3a and 4, which were shown to have been owned by the Neave Building Company and somewhere in the building at the time of the death of Henson, although not in use. The jury heard and passed upon this evidence, and, from their verdict, must have found that the platforms were not suitable devices, taking into consideration the building upon which they were to be used and the manner of occupancy thereof.



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Without further commenting upon the evidence in this case, it is sufficient to say that there is evidence to support at least two of the grounds of negligence set up in the petition, viz., the violation of the ordinance, and the order from the superintendent to proceed to wash the windows notwithstanding the complaint of Henson with reference to snow on the sills.

We find no errors in the admission or rejection of evidence prejudicial to the party herein complaining, and that the special charges given, taken in connection with the general charge, constitute a fair and substantially correct pronouncement of the law applicable to the issues in the case.

Finding no errors, and that substantial justice has been done, the judgment will be affirmed.

Jones (O. B.) and Gorman, JJ., concur.

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### REPLEVIN—WAREHOUSEMAN.

[Cuyahoga (8th) Circuit Court, May 24, 1909.]

Marvin and Henry, JJ.

Judge Winch not sitting.

WILLIAM P. HERIG ET AL. v. WILLIAM AMOS.

Failure of Warehouseman to Notify Owner of Goods In Storage Replevined not Cause for Damages.

An action against a warehouseman for the value of goods belonging to plaintiff, stored with the defendant and replevined by third parties, can not be maintained on the ground that the warehouseman was negligent in his failure to notify the plaintiff promptly of the bringing of the replevin proceedings and became a party thereto in time to have his title to the goods adjudicated.

[Syllabus by the court.]

ERROR.

*J. J. McCormick*, for plaintiff in error.

*Tanney & Barber* and *O. W. Broadwell*, for defendant in error.

MARVIN, J.

The relation of the parties here is the reverse of the relation in which they stood in the court below. The terms plain-

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tiff and defendant, as used in this opinion, speak of them as they were in the original case. The defendants were copartners doing business as the Eagle Storage & Moving Co. and as a part of their business they received into their warehouse and stored for hire, goods for such customers as applied for that purpose to them. The plaintiff brought suit alleging that on July 3, 1902, he delivered to the defendants for storage on his account a large quantity of goods, describing them, of the value of \$1,086. And that he undertook and agreed to pay for such storage \$4 per month, and that on December 4, 1906, the plaintiff demanded said goods from the defendants, tendering the amount of the charges for storing the same, as agreed under the contract, and including cartage of the goods; that upon such demand, the defendants informed the plaintiff that the goods had passed beyond their possession and control, and that they did not know where they were. The plaintiff further alleges that he was notified on November 17, 1906, by the attorney of the defendants that the goods had been taken from them in an action in replevin, and that this was the first notice he had of such replevin action; whereas, he says, such replevin action was begun and the goods taken on the 29th of August, 1905. And so, he charges, that by the gross negligence of the defendants in failing to give him early notice of such action in replevin he was deprived of an opportunity to defend himself and his title to the goods in that action by reason of which the goods have been lost to him and he prays for their value in damages with interest.

The defendants admit that they received the goods under a contract as alleged in the petition; that they did give notice to the plaintiff of the bringing of the action in replevin on November 17, 1906, as alleged in the petition and they further aver that they made all reasonable effort to ascertain the whereabouts of the plaintiff and give him notice of such action, but they had no knowledge of his place of residence, and they were unable to get notice to him earlier than the date already spoken of. And they further aver that the plaintiff had notice of such action in replevin while it was pending and that he neglected to protect his rights in that action, but abandoned it, and thereby by his own negligence failed to protect himself if he was en-

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titled to any protection in the action in replevin. And then by way of cross-petition the defendants aver that a considerable amount of money is owing to them by the plaintiff for storage and cartage of the goods. The result of the trial was that the plaintiff obtained a judgment against the defendants, apparently for the value of the goods, less the amount claimed and shown as due to the defendants for storage and cartage. To reverse such judgment this proceeding is prosecuted.

The facts as shown by the evidence are, that the plaintiff did deliver a considerable quantity of merchandise, as is set out in his petition, to the defendants on July 3, 1902; that he did not keep the storage charges paid up; that on August 29, 1905, these goods were taken in replevin from the defendants in an action brought by one A. J. Cole; that the defendants answered in that action, claiming to be entitled to the possession of the goods; that on August 27, 1907, while said action was still pending, the plaintiff was made a party defendant thereto, and that after having obtained consent of the court on several different days he finally filed an answer and cross-petition in the replevin action on November 12, 1907, and that thereafter on his own motion the plaintiff was dismissed out of that action. It appears by the record of the court in the replevin action before the goods were delivered to the plaintiff in that action they were appraised and a bond given, as required by law. This bond must have been in double the appraised value of the goods, because it was, as shown by the records of the court, given in accordance with the law, and such is the requirement of the law, Sec. 5819 R. S. (Sec. 12056 G. C.), which reads:

"The sheriff shall deliver the property so taken to the plaintiff, his agent or attorney, after the expiration of five days from the time the property is taken, when there is executed by sufficient surety of the plaintiff, a written undertaking to the defendant in at least double the value of the property taken," etc.

This, however, whether the defendant in the replevin action claimed the ownership to the goods or the right to possession only. The situation then is this: that whether the defendants were negligent or not in getting notice to the plaintiff of the pendency of the action in replevin, he received notice in some

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way in time so that he filed his answer and cross-petition and might there have maintained his rights and recovered his damages secured by the replevin bond, had he not, on his own motion, been dismissed from that action.

What wrong did the plaintiff suffer by reason of any failure of the defendants to give an earlier notice of the pendency of the replevin action? It is said in argument, that he was deprived of his right to give a re-delivery bond and thereby recover the goods themselves. It does not appear from any pleading that the plaintiff would have given any such re-delivery bond, nor that the bond given in the replevin action was not adequate and the sureties not sufficient to give him entire protection. Had he remained in the replevin case he could have had all his rights there adjudicated and have recovered whatever damages he sustained by reason of losing this property. We think there was a misconception on the part of those engaged in the trial of this case on the question of when the plaintiff was entitled to notice in the replevin case. Doubtless it was the duty of the defendants to exercise reasonable diligence to get notice to him of the bringing of the replevin action, and in a proper case it would be for the jury to determine whether such promptness and care had been exercised by the defendant to give such notice. But if every substantial right of the plaintiff could have been protected in the replevin action after he had notice and after he became a party to the action, then he lost nothing by not receiving an earlier notice. He could have recovered in that action exactly what he could recover in this action, to-wit, the damages he sustained by reason of his goods being taken from him. Under these facts the court should not have submitted to the jury the question of whether the defendants gave notice to the plaintiff at the time the replevin action was brought, and the charge in so far as it submits that question to the jury is erroneous, because it was a matter of indifference when that notice reached the plaintiff provided it reached him, as it certainly did, in time for him to protect all his rights in the replevin action, and the result is the judgment is reversed and the cause remanded to the court of common pleas.

**Henry, J., concurs.**

Cincinnati v. Traction Co.

## MUNICIPAL CORPORATIONS—RAILWAYS.

[Hamilton (1st) Court of Appeals, July 6, 1916.]

Jones, Jones and Gorman, JJ.

CINCINNATI, BY ALFRED BETTMAN, SOL. V. CINCINNATI TRAC. CO.  
ET AL.

**1. Power for Elimination of Grade Crossings Continuing Without Limitation of Traction Company Franchise.**

The authority vested in municipalities for the elimination of grade crossings is a police power which is continuing in its nature and is in no way limited by the franchise of a traction company whose tracks occupy the street.

**2. Municipality Contracting With Steam Railway for Elimination of Grade Crossing need not Consider Street Railway.**

A municipality in contracting with a steam railway company for the elimination of a grade crossing is not bound to make the traction company occupying the street a party thereto, but may proceed with the improvement without notice to such company.

**3. Street Railway Franchise no Limitation on Power to Change Grade.**

A street railway franchise in the street in no way limits the right of the municipality to change either the grade or the location of the street as the public necessity or convenience may require, particularly where the reasonableness of the change is not questioned, and the traction company must adapt its tracks to the changes so made.

**4. Reasonableness of Assessing Street Railway One-Half Municipal Expense of Grade Crossing Elimination.**

The grade crossing in the instant case was eliminated by the building of a viaduct. Sixty-five per cent, of the cost was paid by the steam road and thirty-five per cent. by the city. The city then obtained a judgment, based upon a verdict, against the traction company occupying the street for its share of the cost of the improvement, which was fixed at \$61,220.09, which was something less than one-half of the share paid by the city.  
**Held:**

That in view of the evidence and all the circumstances surrounding the improvement and the benefit to and the saving which it will effect for the traction company, the proportion of the cost which it is asked to pay is reasonable, and a judgment is awarded similar to that entered in the lower court.

APPEAL.

*Walter M. Schoenle*, Solicitor, and *Constant Southworth*, Assistant Solicitor, for plaintiff.

*Joseph Wilby* and *Ellis G. Kinkead*, for defendant.

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**JONES (O. B.), J.**

This action was brought by the city of Cincinnati to compel the Cincinnati Traction Co. and the Cincinnati Street Ry. to pay to the city their share of the expense incurred in the elimination of the grade crossing of Ludlow avenue and the Baltimore & O. S. W. Ry., and to have the judgment for such share of said expense declared to be a lien on the property of said companies.

Under the provisions of Secs. 8874 to 8894 G. C., inclusive, the city of Cincinnati in conjunction with the Baltimore & O. S. W. Ry. provided for the elimination of the grade crossing of Ludlow avenue over the tracks of the steam railroad company. In so doing a bridge or viaduct was constructed from a point on Ludlow avenue southeast of the Miami canal, running in a direct line to Spring Grove avenue at the same place that the former line of Ludlow avenue intersected it, and that part of the old line of Ludlow avenue included between the north and south lines of the right-of-way of the Baltimore & O. S. W. Ry. was vacated and the grade crossing entirely eliminated, all of the through travel over Ludlow avenue going above said road tracks on the new Ludlow avenue viaduct, including the street railway travel of the defendant company.

The Cincinnati St. Ry. is the owner of the street railway tracks and franchise, and has leased same to the Cincinnati Trac. Co. which is operating them. Previous to the elimination of said grade crossing, a double track road was operated over that part of Ludlow avenue lying west of the point where the east end of the Ludlow avenue viaduct was constructed and across the Baltimore & O. S. W. Ry. track on grade. After the vacation of said grade crossing such operation did not continue, but instead the line was operated over the new viaduct.

The total cost of the viaduct so constructed was \$354,023.63. Sixty-five per cent. of the cost was paid by the Baltimore & O. S. W. Ry. as provided by statute. The city paid 35 per cent., amounting to \$126,692.13, and by ordinance required said street railway and traction companies to bear one-half of the portion payable by it as their reasonable proportion of the cost assumed by said city. Each of the defendants denies the right of the city to collect any part of said cost, and in the event

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that any part should be so chargeable to either of said companies insists that the amount sought to be recovered in this case is excessive and above the amount properly chargeable against them.

The case was tried to a jury in the court of common pleas, and resulted in a judgment against the Cincinnati Trac. Co. in the sum of \$61,220.09, with interest at six per cent. from April 5, 1915; which judgment was declared to be a lien on all the property, real and personal, of the defendant the Cincinnati St. Ry.

The Cincinnati St. Ry. took an appeal from said judgment; and error proceedings were also prosecuted by both companies, to secure a reversal of said judgment. The cause was heard in this court on the appeal of the Cincinnati St. Ry.

Numerous questions were raised in the oral arguments and briefs of both parties. The main questions were all considered and disposed of in the case of *Northern Ohio Trac. & L. Co. v. Akron*, 36 O. C. C. 644 (23 N. S. 497), where Secs. 8892, 8893 and 8894 G. C. were held to be constitutional. This decision was affirmed by the Supreme Court in a journal entry found in *Northern O. Trac. & L. Co. v. Akron*, 91 Ohio St. 382. In that case it was held that the amount fixed by an ordinance of a city, as the proper amount to be paid by a street railway existing in a street where a grade has been eliminated, was a proper basis upon which to institute an action in court, but that the recovery to be had by the city against said street railway for such share of expense should be for such amount as the jury should determine to be a reasonable portion of the cost of the improvement. And in that case the amount fixed by the jury in its verdict, for which judgment was rendered and upheld by the Supreme Court, was less than the amount claimed by the city and fixed by its ordinance.

The proceedings in this case have been had along the same lines as those in the Akron case, the only difference being that in the instant case two companies are interested in the street railway, one as lessor and the other as lessee, the lessee being bound by the terms of its lease to pay all obligations arising similar to the claim here under consideration; and the lessor company being interested only to the extent of the lien upon

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its property in the event of the failure of the lessee company to pay any judgment obtained for such expense.

The power authorized to be exercised by a municipality in the elimination of a street grade crossing over a steam railroad, under the sections above referred to, is an exercise of the police power, which is a power continuing in its nature and not in any way limited by the extent of the grant or franchise. *Columbus Gas Light & Coke Co. v. Columbus*. 50 Ohio St. 65 [36 N. E. 292; 19 L. R. A. 510; 40 Am. St. 648]; *Wabash Ry. v. Defiance*, 52 Ohio St. 262 [40 N. E. 89].

In *Missouri Pacific Ry. v. Omaha*, 235 U. S. 121, it was held by the Supreme Court:

"1. A railway company may be required by the state, or by a municipality acting under the authority of the state, to construct overhead crossings or viaducts over its tracks at its own expense; the consequent expense is *damnum absque injuria* or compensated by the public benefit in which the company shares and is not a taking of property without due process of law.

"2. In the exercise of the *police power* the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with private rights."

And in this case the court in its opinion at page 129 said, in regard to the matter of charging part of the expense to the street railway occupying such street:

"It may be that it would be more fair and equitable to require the street railway to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have such division of expenses."

And in the case of *Chicago & A. Ry. v. Transbarger*, 238 U. S. 67, the court upheld a statute requiring the owners of a railroad to provide means for passing water under their railway embankment long after it had been constructed, as a matter of police regulation.

Nor was it necessary in arranging for this improvement



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that the street railway company or the traction company should be notified of the proceedings or that either should become a party to the contract between the city and the steam railroad company.

In *Chicago, B. & Q. Ry. v. Nebraska*, 170 U. S. 57, the court says, page 76:

"In *State v. Railway*, 33 Kan. 176, the power of the city of Atchison to compel the respondent to construct viaducts was sustained under legislation similar to that herein involved and, referring to the subject of notice, the court, per Judge Valentine, said: 'We do not think it is necessary that the city should have given the railroad companies notice before passing the ordinance requiring them to construct the viaduct. Notice afterward, with the opportunity on the part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct is sufficient.'"

And on page 77:

"So, in the present case, while no notice may have been given to the railroad company of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question."

The rights of the street railway company are to the use of the street, and the fact that they enjoy such a franchise in no way limits the rights of a municipality to either change the grade of that street or to alter its course or location as public necessity may require, and it becomes the duty of the street railway company to adapt its tracks and location to such requirement of the city. And so far as the amount to be paid by it is considered, that is to be fixed not as a matter of determination by the city by ordinance, but as a matter of adjudication by the court subject to the legislative restrictions that have been provided.

There is no question as to the right of the city to change the location of Ludlow avenue in making this improvement. Such power is expressly conferred by the terms of Sec. 8875

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G. C. The only portion of Ludlow avenue which has been entirely vacated is the part lying between the north and the south lines of the right-of-way of the Baltimore & O. S. W. Ry.—that is, the crossing itself, within the lines of the railroad right-of-way. The other two parts of Ludlow avenue as it previously existed still remain public streets being each a cul-de-sac running from either terminus of the new viaduct to the line of the railroad. But because of the vacated portion at the crossing it becomes an impossibility to cross the railroad on Ludlow avenue at grade. The street railway, therefore, being unable to continue the use of its franchise over that crossing, was compelled by reason of the change in the lines of Ludlow avenue by the construction of the viaduct, to transfer its track and operation from the old to the new line of Ludlow avenue between the termini of the viaduct. In other words, the effect is the same as though the entire old portion of the avenue between those termini had been vacated, so far as continuous passage is concerned.

There is no question but that if a street is straightened, as was done by the construction of this viaduct, or if its location is changed by a detour or shifting of its lines to either side of its old lines, that the street railway could claim a right under its franchise to occupy and use the new lines of the street; and such would be the case in this instance regardless of the stipulation made between the parties that the use and occupation of the viaduct should in no way prejudice their rights in this case. And while upon this subject, it might be said that the admission of evidence as to the amount of travel over the viaduct is not regarded as an infraction of this stipulation.

Defendants however have undertaken to argue that this case does not come within the strict literal terms of Sec. 8892 G. C., for the reason that Sec. 12 of the ordinance recites “that the company operating the street railroad *over the present intersection* shall pay a portion of the city’s expense to be hereinafter fixed by ordinance,” and that the ordinance which fixes that portion, in the third paragraph of its preamble, states that “Whereas the tracks of the Cincinnati Trac. Co., a corporation under the laws of Ohio, *cross the right-of-way of said railroad company at a point where under the plans and specifications it*

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*has been determined to construct such improvement."* They argue that because the old crossing at grade is some two hundred and fifty feet further east than the location of the viaduct where the new crossing passes above grade, the "point" of crossing can not be identical in the new and in the old, and therefore that Sec. 8892 does not apply. Such argument is clearly without merit. The same argument might be made as to any sub-grade or overhead crossing because the place of crossing, even though the lines of the street or the lines of the viaduct or subway were identical now with those of the old, the actual tracks would be either many feet above or below the point of the old crossing.

No question is raised in this case as to the reasonableness of the change in location. In fact it is shown by the record that the change is a great benefit both to the traveling public and to the defendants, and that the expense is greatly reduced by the straightening in the line of Ludlow avenue by means of the new viaduct, which forms practically the hypotenuse of a triangle of which the old lines of Ludlow avenue form the other two sides.

The power to so change a highway in separating grades in the crossing of a railway and a highway is well illustrated in the case of *Davis v. Hampshire*, 153 Mass. 218; and an interesting nisi prius decision upon this proposition is found in the case of *Stoner v. Railway*, 20 Dec. 448 (9 N. S. 337), in which a railroad subway crossing was substituted for two railway crossings, being 990 feet away from one and 772 feet from the other.

Defendants, however, insist that the charge as fixed by the judgment below is excessive and far beyond any reasonable charge that should be asserted against them, for the reason that the life of the franchise under which they operate is a matter of only thirty-one years' duration, while the viaduct is supposed to be practically indestructible. The proportionate amount of the respective contributions that should be made by the steam railroad company, by the public, represented by the city or county, and by the street railway company operating over the crossing so changed, is primarily a matter for legislative action. The general assembly has laid down the rule fixing the propor-

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tion of the steam railroad at sixty-five per cent., and that of the city or county at thirty-five per cent.; and the power is given under Sec. 8892 G. C., for the municipality to charge a proper amount of its share against a street railway using the street at such crossing. This amount has been fixed by the general assembly at not to exceed one-half of the thirty-five per cent. charged against the city. Considering the situation of the old grade crossing and the conditions surrounding it, the necessity for its elimination and the benefits accruing from the construction of the new viaduct, we are of the opinion that no case could be found where the propriety of charging the maximum amount allowed by the legislature would be greater than the one under consideration here, and we therefore feel in a measure bound by the legislative expression of the proper portion to be charged against the street railway company; and while it is argued that the balance of the life of the present franchise under which the street railway is operating is only thirty-one years, it must be remembered that the policy of the law of Ohio, outside possibly of this particular franchise, has never been to permit the granting of a franchise beyond the term of twenty-five years; so it can not be considered that such an argument would prevail as against the expressed policy of the legislature. But aside from this policy of the legislature, we think the amount of the judgment in the lower court was fully sustained by the evidence submitted.

The evidence shows that in the opinion of experts the same travel, other than that by street railway, could be accommodated by a viaduct ten feet narrower than the one actually constructed. In other words, not considering the travel in the street cars, a viaduct fifty feet in width without a street railway would accommodate the same travel as does one sixty feet in width where a railway has been placed upon it. And the cost of the additional ten feet of the viaduct was shown to be from about \$64,000 to \$66,000.

It is also shown that a considerable saving would be made to the defendants in the expense of watchmen and maintenance of tracks, frogs and repairs, each year, which if capitalized for the thirty-one years of the franchise still to run would represent a capital of from more than twenty-five to twenty-eight

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thousand dollars, depending upon the rate of interest at which it was figured; that the rental value for the balance of the term of the franchise figured upon only the amount of the judgment would be from \$47,000 to \$51,000; that in addition to these figures a great advantage is obtained by the defendant companies by the removal of probability of damage that may be caused by possible accidents at a grade crossing, the amount of which is not subject to accurate calculation.

It was further shown that new double tracks to the value of \$15,200 had been included in the construction of the viaduct, as well as trolley poles to the value of \$980.

The defendant companies have not indicated accurately what they regard as the proper charge to be placed upon them for their share of the expense of this improvement. The amount of the judgment below being considerably less than the maximum as fixed by the general assembly in Sec. 8892 G. C., and the amount having been fixed in the trial below by the verdict of a jury upon a full and fair presentation, this court upon a full consideration of all the evidence is not inclined to fix a different amount, but is of the opinion that the amount found by the jury and fixed by the judgment of the court of common pleas from which this appeal is taken, is a proper finding and amount, and a reasonable charge to be made against the defendants for their share in this improvement.

A judgment may be taken in this court similar to that in the court below.

Jones (E. H.) and Gorman, JJ., concur.

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**ASSESSMENTS—SEWERS.**

[Lucas (6th) Court of Appeals, February 2, 1914.]

Richards, Chittenden and Donnelly, JJ.

Judge Donnelly of the Third District sitting in place of Judge Kinkade.

**THATCHER V. TOLEDO (CITY) ET AL.****1. Injunction Will Not Lie Against Collection of Assessment Because Sewer Empties Into Creek.**

Where city authorities, acting under favor of the statutes providing for the construction of main or trunk sewers, have established the outlet of such sewer in a river or creek, injunction will not lie to prevent the collection of an assessment therefor on the ground that the sewer has no legal outlet, nor that it constitutes a nuisance, in the absence of a showing of fraud or gross abuse of discretion in establishing such outlet.

**2. Assessment for Sewer not Set Aside Because State Board of Health Requires Abatement of Nuisance.**

An assessment for the construction of a sewer will not be set aside on the ground that the state board of health has determined after the sewer is built, to require the city to submit plans for the abatement of the pollution of the stream into which the sewer empties; nor would the fact that the stream into which the sewer empties proves, ultimately, to be so polluted as to constitute a violation of the statutes prohibiting the pollution of streams by sewage justify setting aside such assessment.

**3. Notice Prerequisite to Sewer Assessment Sufficient if Published in Newspaper.**

Section 3834 G. C., does not violate any constitutional provision by dispensing with the requirement for personal notice to resident owners as a prerequisite to making an assessment on their property for the cost of constructing a main or district sewer, as no personal liability for the assessment attaches to the owners, and in such case a notice given by publication is sufficient.

[Syllabus by the court.]

**APPEAL.***Mr. Charles A. Thatcher, in propria persona.**Mr. Wesley S. Thurstin, Jr., city solicitor, and Mr. Thomas L. Gifford, for the City of Toledo.***RICHARDS, J.**

This action is brought for the purpose of enjoining the collection of an assessment against certain property in the city

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of Toledo owned by the plaintiff, Charles A. Thatcher, levied for the construction of a main or trunk sewer. The sewer extends on Monroe street in a westerly direction from Bancroft street, emptying into Ottawa river or Ten Mile creek. The expenses of constructing this sewer amounted to slightly under \$36,000 and the cost has been paid by the city to the contractor. The property belonging to the plaintiff is in the sewer district, but not abutting upon the street in which the sewer runs, and was assessed for the construction of the sewer in the sum of \$467.82, which amount was payable in five annual installments.

The plaintiff, in his petition, sets forth numerous grounds on which he contends that the assessment made against his property is invalid, but on the trial of the case the serious claims made by him were limited to two, first, that the sewer in effect has no legal outlet and, emptying the sewage where it is emptied from this sewer, constitutes a nuisance; second, that no notice of the passage of the resolution and ordinance by the city council was served on him, although he was during all of the time a resident of the city of Toledo.

At the point where this sewer empties into Ottawa river or Ten Mile creek the distance to Maumee Bay is three miles or more, and the condition of the stream from the point where the sewer empties into it is described by witnesses who testified in the case. From that testimony it appears that during mid-summer the stream has little current, is sluggish or stagnant, and is described by one witness as being dark or black in color and by another as being at times of a green color and having on the surface more or less scum. One witness states that he discovered no odor arising from the stream, but another witness, who lives in its immediate vicinity, states that "We once in a while get a whiff of bad smell, call it anything you want to. The number of mosquitoes is what we notice the most." This offensive condition apparently exists only during a protracted dry season, when the water is very low, for it is evident that during a considerable portion of the year much water passes through the river or creek to the bay, although the fall is not great.

It is disclosed by the evidence that on October 29, 1903,

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the state board of health, by written communication, advised the chief engineer of the city of Toledo that the plans for the sewer districts, embracing the one now in question, were approved upon the condition that if, in the opinion of the state board of health, the outlet should become a nuisance and a menace to the health of the community, a purification plant should be installed, and it was only after this communication was received by the city that legislation was adopted for the construction of this main sewer. This action was commenced in the common pleas court in 1910. On March 20, 1913, being several years after the completion of the sewer and the payment of the expenses therefor, the state board of health determined to require the city to submit definite general plans for the abatement of the pollution of Ten Mile creek.

It is provided in Sec. 3872 G. C. that main sewers shall have their outlet in a "river or other proper place." It is apparent from all the evidence in this case that Ottawa river or Ten Mile creek is not an ideal outlet into which to empty a sewer, but the matter of determining where a sewer shall empty is one which is within the control and discretion of the city authorities, and the rule has long been settled that in the absence of fraud or a gross abuse of discretion the action of those authorities will not be interfered with by the courts.

Plaintiff cites 1 Page and Jones on Taxation by Assessment, Secs. 329, 401, 417, 418 and 447. An examination of these sections tends to elucidate the questions involved in the case at bar although the principles there discussed by the authors may not be decisive as to this case. It is stated in the first section cited that a sewer without an outlet which can be used as of right, is as useless a thing as can be imagined. The statement, of course, is a truism, but the evidence in this case fails to show that this sewer is without an outlet. The outlet, such as it is, has met the approval of the city authorities, and in the absence of a showing of either fraud or a gross abuse of discretion, we are not called upon to interfere with the conclusion thus reached. See *Johnson v. Avondale*, 1 Circ. Dec. 124 (1 R. 229), and *Chamberlain v. Cleveland*, 34 Ohio St. 551, proposition 9 of the syllabus.

In this connection we may call attention to the claim urged



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by plaintiff that the sewage flows through this stream over private property, and that the city has acquired no right from the abutting property owners to thus use the stream. It appears that when the sewer was first constructed it emptied into the Ottawa river at a point on the land owned by Alice M. Whitney and others, and that the circuit court, at the suit of the owners of the property, enjoined the use of the sewer for any purposes, except storm-water drainage, until the right to so empty the sewer should be acquired from the owners of the property at the outlet. *Whitney v. Toledo*, 29 O. C. C. 74 (8 N. S. 577). That right was subsequently acquired by appropriation proceedings, but no proceedings were taken against the riparian owners farther down the stream, and it does not appear that any contentions are being made by such owners in the courts that the sewer can not have its outlet in this stream.

As bearing very closely upon the matter now under consideration, we quote from *Johnson v. Avondale*, *supra*, page 125, where the court, speaking of a sewer outlet, say: "Whether it is a proper one, is, in my judgment, a matter as to which the law confers a discretion on the village authorities, and unless it has been grossly abused, the courts can not properly interfere. And I see no good reason as yet to think that such discretion has been abused. The evidence on this point is, to say the least, very conflicting. Nor do I think the fact that the right of the village to have the outlet at this point, is denied by the owner of the ground, is a good reason why the court should interfere as prayed for at the instance of the plaintiffs. They are not called upon to defend the rights of the owner. If the village infringes on them, he has his remedy; but if the fact that some person might have a claim against the village for flowing sewage upon, or near his lands, is to stop this work, it is probable that the sewer can never be built anywhere. The same claim might be made by the plaintiffs if it was continued and actually emptied into Mill Creek, or some other stream, for it might then be an invasion of the rights of some one as much as it is now."

A case nearly identical in some of its aspects with the case at bar is that of *Cleneay v. Norwood*, 137 Fed. 962, a case which arose under the statutes of Ohio providing for the con-

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struction of sewers. It is urged by plaintiff that the position taken by the state board of health is such that the city is without authority to enforce the collection of an assessment because of the claimed unlawful pollution of this stream. In the seventh paragraph of the syllabus of the case just cited the court say: "That a village, its officers and agents, had violated certain statutes prohibiting the pollution of streams by sewage, and were liable for the penalties prescribed therefor, constituted no ground for setting aside an assessment for the construction of the sewers."

It is insisted, however, that the assessment is invalid because no notice was served upon the plaintiff of the passage of the preliminary resolution and of the ordinance to improve, and in this connection it is contended that such notice is required by the statutes, and if not so required, that the statutes authorizing the assessment are unconstitutional. The resolution and ordinance were duly published and no controversy exists on that point, but only that personal notice was not served on the plaintiff. A solution of the controversy necessitates an examination of the sections of the General Code providing for the making of improvements of this character and assessing the cost therefor. The sewer is a main or trunk sewer and it is provided in Sec. 3878 G. C., in substance, that the resolution providing for the construction of such sewer shall be published once a week for not less than two nor more than four consecutive weeks in a newspaper of general circulation. Section 3834 G. C. especially excepts main or district sewers from the class as to which notice of the passage of the resolution shall be personally given, as provided in Sec. 3818 G. C. We hold, therefore, that under the statutes as they read no personal notice was required to be served upon the plaintiff, notwithstanding he was a resident of the city of Toledo. See *Kohler Brick Co. v. Toledo*, 29 O. C. C. 599 (10 N. S. 137).

The inquiry then arises as to the validity of statutes authorizing an assessment upon the property of a resident without the service of notice on him personally. Plaintiff in his brief cites and relies on *Anderson v. Messenger*, 158 Fed. 250 [85 C. C. A. 468], and *Chicago & Erie Ry. v. Keith*, 67 Ohio St. 279 [65 N. E. 1020; 60 L. R. A. 525]. A careful examination

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of these authorities does not lead us to the belief that they are controlling upon the question now under consideration. The case last cited arose under a statute requiring railroad companies to construct ditches of sufficient capacity to conduct to a proper outlet water which accumulated along the sides of the roadbed. The statute failed to provide for notice, either actual or constructive, to the railroad company so sought to be charged, and for that reason, among others, was held unconstitutional. The court, speaking through Burket, C. J., say on page 291: "The railroad company is notified by the owner or tenant to open the ditch, and is also notified by the probate judge to open it, but no notice is given to it of any hearing, and no provision whatever is made for a hearing at any stage of the proceeding."

It is perfectly manifest that the constitution is invaded by a statute of that character. The statutes under which main sewers are constructed have provisions in them for the giving of notice by publication, as hereinbefore indicated, and they further have provisions whereby the owner of property assessed is notified by publication of the amount of the assessment upon his property, and has an opportunity to be heard as to the validity and justice thereof. See Secs. 3847, 3895 and 3848 G. C.

A proceeding for the establishment of a main sewer is in effect a proceeding *in rem*, and it is not necessary to its validity that a person whose property is sought to be charged with a portion of the cost of the improvement and on whom no personal liability is fixed, should receive actual notice personally of the proceedings. So far as the question under consideration is concerned, the case is similar to *Cupp v. Seneca Co. (Comrs.)* 19 Ohio St. 173, which involved the construction of a county ditch. In that case it is said, on page 182, that the statute made no provision for the service of personal notice upon the landowners. The court then proceeds:

"Nothing is better established as law, than that such rights may be affected, and lost to the owner, by a proceeding *in rem*, and upon merely constructive notice. The law of all such proceedings rests in the necessity of the case, and in no instance, perhaps, is that necessity more plainly apparent than in the construction of public roads, and other improvements of like

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nature. Without the aid of some such proceeding, the construction of roads and ditches would be next to impracticable."

The case has become a leading one in this state and has been many times cited with approval. One of the latest citations of that case is *Portage Co. (Comrs.) v. Gates*, 83 Ohio St. 19 [93 N. E. 255], in which it is held that personal notice to the landowner of the proceeding is not indispensable to its legality.

The law on this subject is well stated in 1 Page and Jones on Taxation by Assessment, section 121, as follows: "The legislature has a wide discretion in determining the nature and kind of notice to be given, though it has no power to dispense with all notice. If such notice is given as will fairly and reasonably apprise the property owner of the pendency of the assessment proceedings so as to give him an opportunity for a hearing upon the merits he is not entitled as a matter of constitutional right to personal service. Notice by publication may therefore be provided for by the legislature without violating the constitutional provision forbidding the taking of property without due process of law."

It is said further by the authors, in section 127, that "Outside of the question of personal liability, personal notice is unnecessary and a reasonable notice given by publication is sufficient."

Finding that the statutes violate no constitutional provision, and that they have been followed in the proceedings leading up to the construction of the sewer in question and the assessment of plaintiff's land therefor, the petition will be dismissed and the injunction dissolved.

*Petition dismissed and injunction dissolved.*

**Chittenden and Donnelly, JJ., concur.**

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## DIVORCE AND ALIMONY.

[Cuyahoga (8th) Circuit Court, May 24, 1909.]

Marvin and Henry, JJ.

Judge Winch not sitting.

GILBERT H. BENTON V. SARAH BENTON.

**1. Aggressions Prior to Insanity Cause for Divorce of Insane Husband.**

A decree of divorce may be entered against an insane defendant for aggressions prior to the insanity.

**2. Concealing Congenital Insanity Invalidates Marriage.**

A divorce granted for fraud in the marriage contract in concealing defendant's congenital insanity from the plaintiff, is not void because the act was committed while insane, for if the defendant was insane when he committed the fraud, the marriage is void.

[Syllabus by the court.]

**ERROR.**

*Fred F. Truhlar*, for plaintiff in error.

*Kerruish & Kerruish* and — *Freiberger*, for defendant in error.

**MARVIN, J.**

The parties here are as they were in the court below. The plaintiff brought suit for a divorce from the defendant in the court of common pleas, alleging as ground therefor that at the time that the marriage between the plaintiff and the defendant was contracted, the said defendant was the wife of another man. The defendant answered, denying that she was the wife of another man, from whom she obtained a divorce in the common pleas court of this county at the April term, 1897. To that the plaintiff replied, admitting that a decree was entered (in said last named court at the time stated in the answer) by the terms of which, if valid, the defendant was divorced from her former husband, John C. Butt, but alleges that the court, at the time of entering such decree, was wholly without jurisdiction to make the same, wherefore the decree was absolutely void and left the defendant still the wife of said Butt. On the trial, the record in the divorce proceedings against Butt was introduced

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in evidence, from which it appears that the petition filed against Butt contains the following allegations as cause for divorce:

"The plaintiff says that at the time of said marriage but unknown to her, said defendant, though entirely sane upon some subjects, was nevertheless at that time a victim to congenital insanity, lapsing occasionally into that condition of mental disturbance known as congenital imbecility. And she says that said difficulty was of that character which escaped observation except to those having expert knowledge; and that the same was accompanied with cunning and a disposition to secrecy and concealment, sometimes characteristic of the mental condition aforesaid. And she says that said congenital condition, though well known to defendant and understood by him to exist, was by him carefully concealed from said plaintiff and that the marriage ceremony aforesaid was enacted between them as aforesaid in complete ignorance upon her part by reason of her youth and inexperience," etc.

And so, she says, that Butt procured the marriage contract between them by fraud.

At the time the suit was brought by the present defendant against Butt he was insane, and confined as such in a state hospital for the insane in this state. That fact being made to appear to the court a guardian *ad litem* was appointed for him, and answer filed denying the allegation in the petition in respect to the mental condition of Butt at the time of his marriage, and denying all fraud on his part in the contract of marriage entered into between the two parties.

Upon the hearing the court entered its decree finding that "the allegations of said petition so far as respects the averments of fraudulent contract are true, and further finds that by reason of said facts the plaintiff is entitled to the relief by her prayed for. Wherefore, it is ordered, adjudged and decreed that the marriage contract heretofore existing between her and said defendant be, and the same is hereby set aside, annulled and held for naught, and she be and is hereby wholly divorced from said defendant, and restored to all her rights as an unmarried woman."

It is the law in this state that a divorce may be decreed against the party who, at the time of entering the decree and

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of bringing the suit, is insane; service being had upon him as in other cases against insane persons, provided the aggressions for which the decree is sought were committed prior to such insanity.

It is urged in this case that the aggressions, to-wit, the fraud perpetrated upon the present defendant by her former husband, upon which she obtained her divorce, is shown by the petition in that case to have been committed while he was insane. This contention is not borne out, as we think, by the petition. A fair construction of the language used, in that Butt was intermittently insane and that the fact that such intermittent insanity was concealed from the woman to whom he was married and that the concealment of such intermittent insanity was a fraud upon her, and the court finding that to be true, certainly had the jurisdiction to grant the divorce. We must assume that the court found that the mental derangement from which Butt was suffering at the time of his marriage was not such as to prevent him from being capable of contracting the marriage relation, but was of such a nature that it was a fraud upon her to whom he was about to be married, and that he concealed the fact that he was subject to this intermittent insanity; otherwise there was never any valid marriage between the defendant in this case and Butt; for if he was insane to the extent that he was incapable of perpetrating a fraud, then he was insane to the extent that he could not have contracted a marriage at all, so that after the decree in the former case, the defendant in this case was not the wife of Butt. Either she was released from such marriage by the decree, or she never was Butt's wife. We find that she was released by the decree, but if we are wrong in this, still, as has already been said, it must be that if she was not so released, she never was Butt's wife.

In the suit brought by the plaintiff here against the defendant, she not only answered setting up the facts as hereinbefore set out, but she set up by way of cross-petition acts of cruelty on the part of the plaintiff, which, if established by the evidence, entitle her to alimony for which she prayed, and which was decreed to her.

The purpose of the present proceedings is to reverse this judgment for alimony, for the reasons already stated, that is,

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that the defendant was never the plaintiff's wife. Having found as we have, that she was the plaintiff's wife, the court was justified in allowing her alimony, and that judgment is affirmed.

Henry, J., concurs.

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CORPORATIONS.

[Cuyahoga (8th) Circuit Court, June 7, 1909.]

Marvin, Winch and Henry, JJ.

JOHN BECK v. SIMON FISHEL.

**Officer Selling Property of Corporation at Secret Profit Required to Account for Same to Stockholders.**

The president and general manager of a corporation induced all the stockholders to agree to a sale of all the corporation assets at a price which would net them 200 per cent. on their investment: when stating the proposition to them he also stated that he expected to make a good thing for himself over and above what the others made; it afterwards turned out that he received 1450 per cent. for his holdings and a contract on his part not to engage in the business for a term of years. Held: That his disclosure was not full enough to protect him in actions thereafter brought by one of the stockholders for an accounting, after discovery of the real price received for the property.

[Syllabus by the court.]

*Smith, Taft & Arter*, for plaintiff.

*Max P. Goodman and White, Johnson, McCaslin & Cannon*, for defendant.

**MARVIN, J.**

The plaintiff in this action seeks to have the defendant make an accounting of moneys received by him on the sale of certain stock in the Fishel Brewing Co., a corporation which was sold by the defendant for the plaintiff, and he seeks to recover whatever amount such accounting shall show as due to him from the defendant.

The facts are these: The Fishel Brewing Co. was a corporation; it was organized in 1904, and began business June, 1905, and was sold out to the Cleveland & Sandusky Brewing Co. after having done business about nineteen months. The paid up capital stock of this corporation was \$221,000, of which



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the defendant owned \$25,000, the remaining \$196,000 being owned by other parties, \$5,000 of which was owned by the plaintiff. The defendant was the president and general manager of this corporation. The plaintiff aside from owning stock had no connections with the corporation and no acquaintance with its business. The business for the time the corporation did business was exceedingly profitable; the net profits for the year 1906 on this capital of \$221,000 was \$85,000. The defendant at the annual meeting in January, 1907, made a report showing the financial situation of the company, and showing this net profit for the year 1906. The plaintiff was not present at the stockholders' meeting at which this report was made, and had no actual knowledge of what the profits of the business were. On February 13, 1907, the defendant sent notice, in writing, to the stockholders of this corporation requesting that they meet at the office of the company on February 15th, at 2 o'clock in the afternoon, and that they bring their certificates of stock with them. The plaintiff and most of the stockholders responded to the call; the plaintiff took with him his certificate of stock, and was there introduced to Mr. Fishel, with whom up to that time he had no personal acquaintance. He was informed by Mr. Fishel that there was an opportunity to sell out the assets of the corporation for two hundred per cent. of the par value of the stock, and at the suggestion of Mr. Fishel, the plaintiff and most of the other stockholders signed a writing which authorized Fishel to transfer this stock to the Cleveland & Sandusky Brewing Co. for 200 per cent. of its face value.

On February 22, 1907, the defendant, pursuant to the authority given him by the stockholders, sold the entire assets, excepting only the cash of the company in the bank or in the hands of its treasurer, and the horse and buggy used personally by the president of the company, to the Cleveland & Sandusky Brewing Co. By the contract of sale the Fishel Brewing Co. agreed to furnish contracts of Simon Fishel and his son, Theodore Fishel, that each "will not at any time within ten years from the date of transfer, either directly or indirectly engage or be in any manner whatsoever interested, either as principal, or agent, or employe, or stockholder in the business of manufacturing or vending beer in or within the radius of 150 miles

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from the city of Cleveland, state of Ohio, nor aid or assist anyone else to do so within said limit, except only as a stockholder of or employe of or with the consent in writing of the Cleveland & Sandusky Brewing Co., its successors and assigns."

The contract further provided that the Fishel Co. would procure and furnish "an agreement from Simon Fishel that he will not for the period of ten years from the date of the acceptance hereof, sell any of his property which he may now own or which he may own during said period, without first giving a reasonable opportunity to the party of the second part to purchase the same from him on such terms as he would be willing to accept from any other party, and secondly, that during said period he will not lease for saloon purposes to any other party any property which he may now own or which he may own during said period, without giving the party of the second part, its nominees or assigns, a reasonable opportunity to lease said property from him on the same terms which he would accept from another party."

The amount paid by the Cleveland & Sandusky Brewing Co. was \$850,000. Out of this amount the debts of the Fishel Co., which amounted to about \$95,000, were to be paid, leaving after the payment of debts about \$775,000. Out of this amount the defendant paid to the plaintiff and to the other stockholders (excepting himself) two hundred per cent. (200 per cent.) of the par value of their holdings. This required \$392,000, still leaving in the hands of the defendant the sum of \$363,000, which was 1450 per cent. of the par value of his stock, whereas the other stockholders received but 200 per cent.

It is urged that a part of this \$363,000 was paid because of the agreement that neither the defendant nor his son would in any wise engage in the brewing business within 150 miles of Cleveland for the period of ten years.

The defendant was a man of large experience and superior attainments for the conducting of the brewing business, and without question the Cleveland & Sandusky Brewing Co. was very desirous of putting an end to any competition on his part in the business, and they could well afford to pay a liberal amount to prevent such competition. They were also desirous of putting an end to the competition of the Fishel Brewing Co.

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The plant of this company was the best (Mr. Fishel says) of its size in or about the city of Cleveland, and it had done so large a business as greatly to interfere with and lessen the business of the Cleveland & Sandusky Brewing Co. The fact that this company had such an excellent plant and that its competition was so prejudicial to the Cleveland & Sandusky Brewing Co. was due in great measure undoubtedly to the ability and experience of the defendant. The fact that its plant was of the very best was because it was erected and equipped under the direction and management of the defendant, but to the extent that the Fishel Co. was a dangerous competitor and would justify the paying by the Cleveland & Sandusky Brewing Co. a large price in excess of the physical value of the assets, was the property of the Fishel Co., notwithstanding the fact that this business was due in great measure to the efforts of the defendant, for the defendant was its employe, he was paid a salary of \$6,000 a year to manage this business, and if the good will of the concern was enhanced in value because of his superior management, the company was entitled to the benefit of it; but to the extent that in the future it was desirable to so tie up Mr. Fishel that he could not compete with the Cleveland & Sandusky Brewing Co., was a matter for which he alone would be entitled to be compensated.

It will be noticed, however, that in the contract of sale no special amount was fixed for this contract of Fishel to remain out of the business, except as he should be employed by the Cleveland & Sandusky Brewing Co., so that it is left entirely uncertain as to what the last named company was to pay as a consideration for this refraining, on Fishel's part, to engage in the business. If any attempt had been made to arrive at the value of this part of the contract it would seem as though the compensation which Fishel had theretofore received for his services would be taken as a basis upon which to make the computation. The highest salary which he had ever received, so far as appears from the evidence, he received from the Cleveland & Sandusky Brewing Co. for the period of six years, ending in February, 1904. During that period he had acted as general manager of the Cleveland & Sandusky Brewing Co. at a salary of \$8,500 per year, and this at a time when the business

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was not interfered with or threatened by the unfriendly legislation which Fishel says had already reduced and is likely very greatly to reduce the sale of the product of breweries.

It would hardly seem that a great amount would be taken into account in estimating the value of his services for the future, with all this legislation of which he speaks, interfering with the business, than the compensation which he received during the six years he was with the Cleveland & Sandusky Brewing Co. Taking that as a basis, it will be found that if \$69,000 had been paid to him for this restriction on his employment, he could have taken out \$8,500 as pay for his first year, loaning the balance at 5 per cent. per annum, payable annually, and he could have received \$8,500 at the beginning of each of the remaining nine years, so that under this estimate, if \$69,000 had been allowed him as compensation for his keeping out of the brewery business, he might have done nothing and still have had as much as he could have earned at the largest salary that he had ever received and be paid each year in advance. If this amount had been taken out of the \$363,000 there would still have been in his hands 1175 per cent. of the value of his stock, but he says that he communicated to the stockholders such facts as relieved him from accounting to them for all that was received for this property, and the facts in relation to such communication to the stockholders are these:

On February 15th, after the plaintiff had signed the writing which he signed and to which attention has already been called, an informal meeting of the stockholders was held in a room at the brewery plant, at which Fishel made some remarks. This meeting was attended by the plaintiff. Whether he remained until its conclusion or not we do not determine, but he was there when Fishel made the statement, testified to by him, as appears on page 303 of the bill of exceptions. That statement was:

*"Gentlemen:* The Cleveland & Sandusky Brewing Co. is after us and want to buy us out. The Cleveland & Sandusky Brewing Co. isn't after the plant or after you to love you or me, they are after the trade and they want to get me and my son out of the way, and here is the option, and if we can get from them—they didn't make any offer yet, and I did not

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neither—and if I can get what I made up my mind here—If I can get all the money back you put in, and if I can get the bonds, at the market price what it was on that date, 94½, and if I can get preferred stock at 74, and I wouldn't take no common stock under no means, and then we make the deal. Besides that I must make a great big sum for myself and for my son. If I will get that, now will you be satisfied."

He says that after having said this he asked if there was anybody present who had anything to say against it, because if he had, he should say so then and the deal would be off, because he says he would not go a step further, and then he added, "if there is one man who has the idea it should not be done, he should express himself and the deal will be off and we will be friends again."

Nobody made any objection. All seemed to be well pleased that they were getting two hundred per cent. for their stock. One of them, a Mr. Ryan, stated in a loud voice so as to be heard by all, that he hoped that Fishel would make a million. He seems to have been extraordinarily well pleased, for he says that theretofore when he has held stock in a corporation, his dividends consisted in assessments on his stock, whereas here he was getting 200 per cent. for his stock. It is perfectly manifest that all of the stockholders at that meeting were greatly rejoicing that the sale could be made at 200 per cent. and were willing that Fishel should make a good thing besides. At this meeting of the stockholders a resolution, somewhat remarkable, was adopted. This resolution was introduced by Max P. Goodman, the man through whom the transfer of the company from Fishel to the Cleveland & Sandusky Brewing Co. was made. The last clause of this resolution reads: "Be it further resolved, that we admire the candor of our president in stating that if the sale were made he expected to receive a good return himself, irrespective of the proposition submitted to the stockholders."

Unless it had occurred to somebody friendly to Fishel that it might be that when the stockholders came to learn that he had received 1450 per cent. on his stock, while they had received but 200 per cent., or had received 1450 per cent. for his stock, including his contract worth at the outside not more than \$69,000, not to compete with the Cleveland & Sandusky Co.

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for ten years, that they would not feel that he was especially entitled to thanks for his "candor" in stating that if the sale were made, he expected to receive a good return himself.

Nothing has thus far been said in reference to the restriction of the sale or lease of any real estate of Fishel, that is, giving the Cleveland & Sandusky Brewing Co. an opportunity to purchase or lease on as good terms as he could get from anybody else, and the reason nothing was said about it is this was in nowise a restriction which could interfere with Fishel's getting the highest price either upon lease or sale of any or all of his real estate.

That the law requires of an officer of a corporation the utmost good faith in dealing with his stockholders is recognized everywhere; he is a trustee for his stockholders, and as such is bound to communicate to them the facts which affect the value of their property, and in case of the sale of the property, the facts known to him which affect the price at which the property is sold. Ordinarily the officer of a corporation is bound to account to his stockholders for the avails of any sale made by him, as any other trustee is bound to account to his beneficiary for the avails of sales made by him, and he is excused from paying over to his stockholders each his aliquot part of the avails of the sale, when, after full and fair disclosure, the stockholder consents to the officer retaining part of such avails as compensation to himself. See *Oliver v. Oliver*, 118 Georgia 362 [45 S. E. 232]; *Stewart v. Harris*, 69 Kan. 498 [77 Pac. 277; 66 L. R. A. 261; 105 Am. St. 178]; *New York & N. N. Ry. v. Hudson*, 16 Beavan's 485; 3 Thompson, Corporations, Sec. 4024, and cases cited.

In Sec. 4025, Thompson, Corporations, this language is used:

"The rule does not mean that a trustee is absolutely prohibited from making a profit out of his trust relation. It means that he must not make a secret profit out of it. His duty is not to avoid wholly the doing anything for his own benefit, for the class of trustees we are considering, the directors of corporations, are generally interested in the subject-matter of the trust. His obligation to the beneficiaries in the trust is to make a full, fair and complete disclosure of all the circumstances

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attending any transaction which will benefit himself in any matter different from the manner in which all the shareholders will be benefited. If the body of the shareholders are made fully acquainted with the nature of the transaction, and agree to it, and agree that he shall have and retain the special benefit that may accrue from it, then they will not be heard afterwards to claim that this benefit shall be surrendered up to them as a profit, which he ought not, in good conscience, to retain."

In the case of *Bristol v. Scranton*, 57 Fed. 70, to which attention is called by counsel for the defendant, it appears that William W. and Walter Scranton were brothers, that they were the officers and managers of a corporation, that they sold the assets of that corporation to another corporation and at the same time each entered into a contract for a large consideration that he would not compete with the purchaser in the business carried on by the purchasing corporation, and the court held that under the facts in that case the stockholders of the selling corporation were not entitled to have that which was paid to these individual men as an inducement for them to refrain from competing with the business of the purchasing corporation. They reason that the amount paid to each was a fixed and certain amount; that it was not an unreasonable amount; that it was contained in a separate contract; that the stockholders of the selling corporation received not only all that their stock was worth, but all that the purchasing corporation paid for it. In the opinion this language is used on page 78:

"Undoubtedly the rule is that one acting in a representative or fiduciary capacity is not allowed so to deal with the subject-matter of his agency or trust as to benefit himself privately, and the agent or trustee who thus makes a profit out of his agency or trusteeship, must account for the same to his principal or *cestui que trust*; and it may be conceded that the rule applies, as a principle of public policy without regard to the actual fairness of the transaction, or the merits of the service rendered or the price paid in case of a sale or purchase."

The court then goes on to show that the amount paid to these two officers was paid to them upon the personal contract of each and was in no proper sense paid as a part of the pur-

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chase price of the selling corporation. Even in this case the court says:

"It was unfortunate, and we think a mistake, that the Serantons did not give the plaintiffs full information with respect to their individual contract before the stockholders meeting, but in our judgment they are not justly chargeable with intentional concealment."

Under the facts and the decision in this last named case we do not feel that it aids the defendant in the present action. At the time of the meeting on February 15th, Fishel did not know, he says, how much he would be able to obtain. At that time he did not understand that there was to be a contract which would prevent either him or his son from competing in the brewery business with the Cleveland & Sandusky Brewing Co. This we find from his testimony as to what occurred later, when he had a meeting with a committee of the Cleveland & Sandusky Brewing Co., at which meeting, for the first time, it was suggested that he would be asked to enter into a contract to refrain from engaging in the brewing business. He says he was surprised when this was proposed to him, and that he at once made up his mind that he must have more than he had before expected to demand.

We find that the statement made by Fishel to his stockholders after the plaintiff and many others had signed the contract authorizing the sale of their stock, that he would make a good thing for himself besides obtaining 200 per cent. for them, falls a long way short of being a disclosure which would cause any of them to dream that he was to get either 1450 per cent. or 1175 per cent. for his stock, while they got but 200 per cent. for theirs.

The result is, we find, that the plaintiff is entitled to the accounting for which he prays. We have not the exact figures upon which to make the accounting, but it can probably be made by counsel very readily, and when such accounting is had the plaintiff will be given a judgment for his proportionate share of the entire amount received on the sale of this property.



Nielsen v. Taylor.

### PARTNERSHIP.

[Cuyahoga (8th) Circuit Court, May 24, 1909.]

Marvin and Henry, JJ.

Judge Winch not sitting.

\*P. E. NIELSEN v. C. E. TAYLOR.

#### Representations to Third Person Not Conclusive of Partnership.

It is not conclusive that a partnership exists between two persons that they represented themselves as partners in their dealings with third persons, if plausible reasons are given for so representing themselves, and the evidence otherwise establishes the fact that no partnership in fact existed between them.

[Syllabus by the court.]

ERROR.

MARVIN, J.

The relation of the parties here is the reverse of the relation in which they stood in the court below. The terms plaintiff and defendant however, as used in this opinion, refer to the parties as they stood in the original case.

Several suits were brought by the plaintiff against the defendant, each upon an account for services claimed to have been rendered by the plaintiff to the defendant. In each case the defendant answered that whatever services were rendered by the plaintiff were rendered not to the defendant, but as a member of a co-partnership composed of the plaintiff and the defendant. These several cases were originally brought before a justice of the peace and each was appealed to the court of common pleas, where they were consolidated and tried as one case. It was admitted at the trial, that if the plaintiff was entitled to recover the amount claimed in the several actions was the proper amount, so that the only issue submitted to the jury was the question of whether the plaintiff and defendant were partners at the time the services were rendered. The jury returned a verdict for the plaintiff and judgment was entered upon that verdict, and it is to reverse this judgment the present proceeding is prosecuted.

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\*Affirmed, no op., Nielsen v. Taylor, 83 Ohio St. 442.

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The charge to the jury is not complained of and the only question left for this court to pass upon is whether the verdict is so manifestly against the weight of the evidence as to require a reversal. The plaintiff testified unequivocally that he was employed by the defendant for which he was to be paid \$100 a month and to receive one-third of whatever profits should be made out of a business in which he was so employed by the defendant. He said the only talk of partnership between him and the defendant was that the defendant held out to him that he might thereafter become a partner. The defendant, however, testifies that a partnership was formed and he introduces two contracts, one of the date of July 20, 1905, the opening sentence of which reads:

"This agreement entered into this 20th day of July, 1905, between the American Automatic Weighing Machine Co., party of the first part and the N. C. T. Stamping & Mfg. Co., composed of P. E. Nielsen and C. E. Taylor, parties of the second part."

This is a contract by which the party of the second part contracted to manufacture certain machines for the party of the first part, and it is signed on behalf of the party of the second part by P. E. Nielsen and Charles E. Taylor, the plaintiff and the defendant in this action. Another contract was introduced, the opening sentence of which reads: "Articles of agreement made and concluded at Cleveland, Ohio, this 11th day of December, 1906, and by and between P. E. Nielsen and C. E. Taylor, known as the N. C. T. Stamping & Mfg. Co. party of the first part," and "John H. Williams, party of the second part," and this is a contract whereby the party of the first part undertook to manufacture certain devices for the party of the second part, and this is signed on behalf of the parties of the first part in these words: "N. C. T. Stamping & Mfg. Co., by C. E. Taylor, P. E. Nielsen."

The name C. E. Taylor as appears upon each of these contracts is admitted by the plaintiff to have been written by himself, and these two contracts unexplained, tend strongly to support the proposition that Taylor was a partner in this business carried on as the N. C. T. Stamping & Mfg. Co., but the testimony of the plaintiff is that he signed these with Nielsen to

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aid him in securing two contracts and that whatever they tended to represent to the other parties and to the contracts they did not represent the true relation between himself and Nielsen. The jury believed Taylor's testimony. We find no reason why they should not have believed it. Believing it, they returned the only verdict which could have been returned properly, and the judgment is affirmed.

Henry, J., concurs.

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### CRIMINAL LAW—PERJURY.

[Cuyahoga (8th) Circuit Court, May 21, 1910.]

Marvin, Winch and Henry, JJ.

ULYSSES G. WALKER v. STATE OF OHIO.

**1. Indictment for Aiding and Procuring Perjury Sufficiently Charging Accused with Knowledge that Principal had Knowledge.**

In an indictment for aiding, abetting and procuring another to commit perjury, the fact that the accused knew that the person whom he aided knew that he was committing perjury is sufficiently alleged by charging that the accused willfully and corruptly aided, abetted and procured the other in making, verifying and falsely swearing to a bank report, "then and there well knowing said report to be false and untrue, and thereby to commit willful and corrupt perjury in the manner and form as aforesaid."

**2. Presence when Perjury Committed not Necessary for Conviction for Aiding Crime.**

One may be found guilty of aiding and abetting the commission of perjury, though the evidence does not show that he was personally present when the perjury was committed.

**3. Wording of Oath not Material.**

No particular form of words is necessary to the taking of an oath if both the officer who administers it and the person taking it, understand that an oath is being administered.

**4. Picturesque and Exaggerated Language by Prosecutor not Ground for Reversal of Conviction.**

Picturesque and exaggerated language used by counsel for the state in addressing the jury in a criminal case does not necessarily require a reversal of a conviction.

ERROR.

*Norton T. Horr and Jay P. Dawley*, for plaintiff in error.

*John A. Cline and Walter D. Meals*, for defendant in error.

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**MARVIN, J.**

The plaintiff in error was tried and convicted in the court of common pleas of the crime of perjury. The claim on the part of the state being that he aided, abetted and procured one William G. Duncan to knowingly swear falsely in a certain affidavit which was made as to the truth of a certain report, made to the superintendent of banking of the state of Ohio, the said Walker being the president and the said Duncan the treasurer of a banking company known as "The South Cleveland Banking Company." The statute defining perjury and providing for its punishment is Sec. 6897 R. S. (Sec. 12842 G. C.), and reads:

"Whoever either verbally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood as to a material matter in a proceeding before a court, tribunal or officer created by law, or matter in relation to which an oath is authorized by law, is guilty of perjury and shall be imprisoned in the penitentiary not less than three years nor more than ten years."

There is no statute making a separate crime of subornation of perjury, but Sec. 6804 R. S. (Sec. 12380 G. C.) reads:

"Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender."

So that if any offense is charged here against Walker it is a charge of perjury, and results from his suborning Duncan to knowingly swear falsely.

The sufficiency of the indictment was challenged both by motion to quash and by demurrer, both of which were overruled and the validity of the indictment sustained.

It is here claimed that the court erred in sustaining the indictment, the claim being that in order to make the indictment good, as against one who procures another to commit perjury, it must appear from the indictment that the thing sworn to must have been false; that it must have been known to the party making the oath that it was false; that it must have been known to the party procuring the swearing to be done that it was false and it must be known to the party procuring the swearing to be done that the party making the oath knew that it was false. It

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is said that the indictment here, though it does charge that what was sworn to by Duncan was false and that Duncan knew it to be false, that Walker knew it to be false, yet it does not charge that Walker knew that Duncan knew that it was false, the argument being that unless Walker knew that what he was inducing Duncan to do would be perjury on Duncan's part, then there would be no guilt on the part of Walker because Walker did not know that he was inducing Duncan to commit perjury, because there would be no perjury on the part of Duncan if he believed that what he swore to was true, and so if Walker supposed that Duncan supposed that what he said was true, then Walker, though he so induced Duncan to swear to something that was not true did not know that he was inducing Duncan to commit perjury, because he did not know that Duncan did not know it was not true, and our attention is called to the case of *Stewart v. State*, 22 Ohio St. 477. The first proposition in the syllabus of that case reads:

"An essential element in the crime of subornation of perjury is the knowledge or belief on the part of the accused, not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly."

The second proposition reads:

"An indictment for subornation of perjury, setting forth in due form of law the crime of willful and corrupt perjury by the suborned witness, and then averring that the defendant feloniously, willfully and corruptly did persuade, procure and suborn the witness to commit 'said perjury in manner and form aforesaid,' sufficiently charges the defendant with knowledge that the witness would corruptly and knowingly swear to that which was false."

In the opinion by Chief Justice Welch, it is said, speaking of the indictment in that case:

"It first charges in due form of law, the crime of willful and corrupt perjury by Saxton, including the averment that Saxton knew his testimony to be false and fictitious, and concluding with the averment that Saxton had 'in manner aforesaid' committed willful and corrupt perjury; and it then charges that Stewart 'procured, persuaded and suborned the witness to com-

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mit said willful and corrupt perjury in manner and form aforesaid.' The natural and primary import of this language is, to charge upon Stewart a knowledge of the guilt and corruption of the witness. The essence of perjury is the knowledge of the witness that what he states is false. To persuade him to commit perjury is to persuade him to stifle his conscience, and to state under oath what he knows not to be true. To persuade him to do less, that is, to make the false statement without the guilty knowledge, is not to persuade him to commit the crime."

It would appear from this that the proposition is sound, that it must appear from the indictment that the accused knew that if the other party did that which he was persuaded to do by the accused, such other party would thereby commit perjury. But it is said that this indictment charges that the accused "procured, persuaded and suborned the witness to commit said willful and corrupt perjury in the manner and form aforesaid." Tested by that rule it seems to us that this criticism of the indictment is not well taken. The indictment in the present case sufficiently charges Duncan with knowledge so as to constitute his swearing as perjury on his part. It distinctly charges knowledge on the part of Walker that what Duncan was to swear to was false, and then follows these words:

"And the said Ulysses G. Walker then and there and at all times aforesaid, and on the day and year aforesaid, prior thereto, and at the county aforesaid, did feloniously, willfully, corruptly and unlawfully aid, abet and procure him, the said William G. Duncan in making, verifying and falsely swearing to said report, and the matters and things therein stated as aforesaid, then and there well knowing said report and the matters and things therein stated to be false and untrue, and thereby to commit willful and corrupt perjury in the manner and form as aforesaid."

We think the allegation in this indictment that Walker knew that what Duncan would swear to was known by Duncan to be false is stated more distinctly than in the indictment considered in *Stewart v. State, supra*. The language here is that Walker feloniously, willfully, corruptly and unlawfully did aid, abet and procure Duncan, in making, verifying and falsely

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swearing to said report. That is, Walker feloniously procured Duncan to swear falsely and thereby to commit willful and corrupt perjury. Certainly, judged by the rule laid down in the Stewart case, this knowledge on the part of Walker that Duncan knew that what he swore to was false, is sufficiently stated.

It is however urged that the facts upon which the averment rests that Walker aided, abetted and procured Duncan not being stated, the indictment in that regard is not sufficient. This objection is, as we think by the case of *Stewart v. State, supra*, completely answered, and is so answered by the second paragraph of the syllabus, already quoted.

It will be seen that in that case the averment that the defendant did "persuade, procure and suborn the witness to commit said perjury in manner and form as aforesaid," was held to be sufficient as an indictment. It is true that in that case the question does not seem to have been raised as to whether the specific acts of the defendant, constituting the aiding, abetting and procuring, were necessary to be stated, but as the court held the indictment good and as the charge was practically in the same words as in the indictment now being considered, we should regard it as exceedingly technical, indeed as against the authority of that case, to hold the indictment here bad by reason of the alleged defect now being considered.

Under our statute, Sec. 7215 R. S. (13581 G. C.), which provides that, "No indictment shall be deemed invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," we think this indictment clearly sufficient.

Since by our present statute one who aids, abets or procures another to commit a crime is himself a principal offender and may be convicted of the principal offense upon the establishment to a proper degree of certainty that he did either aid, abet or procure another to commit the crime, we find that under the indictment under consideration the state would be permitted to introduce evidence to establish the aiding, abetting or procuring, and we do not find that one might not be found guilty of aiding and abetting the offense of perjury without being personally present when such perjury was committed.

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In the case of *Chidester v. State*, 25 Ohio St. 435, the statute under consideration made the procuring of a crime to be committed a separate crime from the principal offense, and so differed from the present statute in that regard, and under the statute as it then was, it was held, that one under indictment for forgery could not be convicted of that offense without being personally present when the forgery was committed. It by no means follows from this that if he had been indicted for procuring the defendant, or abetting the forging of the instrument, it would have been necessary that he be present. Indeed, the language of the court clearly indicates that such would not be the case. This is said in this connection because the brief of counsel for plaintiff in error urges that under the evidence in this case, it being clearly made to appear that Walker was not personally present when the alleged perjury is claimed to have been committed, he could not be found guilty of aiding or abetting the perjury but only of procuring the perjury to be committed, if he could be convicted of anything, and so, it is urged, that under the facts of the case, the defendant was not properly convicted under the evidence, because it does not appear that Duncan would not have done what he did without any suggestion or procurement on the part of Walker. And attention is called to the definition of the word "procure" and quotation is made from 22 American & E. Ency. L. (2d Ed.) p. 697, of these words:

"Subornation of perjury is procuring a person to commit perjury which he actually does in consequence of such procurement."

Section 1197 of Bishop's Criminal Law is called to our attention, where it is said in the brief of counsel, this language is used, in speaking of perjury, that such perjury was committed "in consequence of the persuasion." We have carefully examined the section in the 8th Edition of this work, published in 1892, and fail to find the language quoted. In support of the text several cases are cited, and we are not prepared to say that the proposition is not true and that one can only be convicted of procuring another to commit this crime when such other does commit it in consequence of such procurement. But



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further, we are not prepared to say that the jury might not, under the evidence in this case, have properly found that whatever was done by Duncan in the matter under consideration, was done in consequence of the procurement by Walker or the inducements held out to him by Walker.

On December 2, 1908, Walker was president of a banking corporation known as the South Cleveland Banking Company. Duncan was the treasurer of the same corporation. Under the laws of the state, the officers of this corporation were required to make a written report, under oath, from time to time, to the superintendent of banks of the state. At the date last aforesaid a report was made out on printed forms furnished by the said superintendent upon which blanks were left to be filled out in writing. On what is known as the front page of that report, one of the things required to be reported was "overdraft." The amount filled out as against this item by Walker was in figures \$567.71. This was not a true statement of the condition of the bank as to "overdrafts," unless more than \$300,000 which was owing to the bank by the Werner Company of Akron, was properly treated as a loan and not as an overdraft. This was carried on the books of the company as an overdraft. It grew out of transactions between this bank and the Werner Company, involving more than a million dollars, which last named amount was owing by the Werner Company to the banking company at the time this report was made out. The banking company at this time held bonds of the Werner Company to a large amount, which represented a part of this indebtedness or in any event which were held by the bank because of this indebtedness.

The claim is made on the part of Walker that the bank was not the owner of the bonds last spoken of, but held them only as security for the payment of this indebtedness, which has been mentioned in this opinion as more than \$300,000, and that this sum was a loan to the Werner Company; that the bank did not own the bonds, and that therefore the bonds were not included as such in this report, but that this amount was included in what was reported under the heading of "Loans and Discounts." The evidence establishes that at one time the bank held the notes of the Werner Company for this amount; that it gave up

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these notes, endorsed them as canceled and paid and accepted these bonds, and we think from the evidence it is perfectly clear that either these bonds were the property of the bank and should have been included as such, or they were held as security for an overdraft to this amount. Walker says that he did not report to the directors of the bank the true situation of this indebtedness because he feared to do it. All that is said by Walker about it in his testimony shows that both he and Duncan were purposely deceiving the directors of the bank with reference to this debt, and that it was intended to deceive the superintendent of banks, and from Walker's testimony we think the jury were warranted, in finding that this indebtedness to the bank should have been reported as an overdraft. It was in fact such, and it was so carried on the books of the Werner Company. It was by Walker and Duncan intended that the directors should understand it to be other than what they knew it to be, and for this purpose a report was made out as it was, making this very serious false statement. After Duncan had made out the report as herein indicated, he signed his name to an affidavit, printed at the foot of the report, which reads:

"I, W. G. Duncan, Treas. of the South Cleveland Banking Company, do solemnly swear that the above statement is true, and that the schedules on the back hereof fully and correctly represent the matters therein to be covered to the best of my knowledge and belief."

To this there follows the following:

"The State of Ohio, County of Cuyahoga. Sworn to and subscribed before me this 2nd day of Dec., 1908.

"G. W. GILL,

*"Notary Public."*

The notarial seal of the notary is affixed.

On the back of this report blanks were filled out by Walker, undertaking to give the situation of the bank as to loans and discounts. This was equally false in that it reported the amount of bonds of the Werner Company held by the bank as \$10,000, omitting entirely the \$300,000 worth of bonds which have been

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spoken of, and which were, as already stated, either the property of the bank or held as security for the overdraft already mentioned. Walker says that this placed upon the back was put upon it by him after the portion written by Duncan was put on, and after the affidavit was signed by Duncan. He says also that he saw this was so signed by Duncan; that it was laid by Duncan on his desk, and that he expected him to swear to it.

It is urged that this, with all other evidence put together, fails to show that Walker procured Duncan to swear to this report. He directed Duncan to make the report, knowing that he was to swear to it. When he gave that direction it is perfectly clear that both he and Duncan understood that it was to be a false report in the particulars already pointed out. Duncan was an officer subordinate to Walker, and knew that if he followed the direction of Walker, as expressed or necessarily implied, he must make out and swear to a false report. If it was false, as we find it to be, Duncan knew that it was false; Walker knew that it was false; and Walker knew that Duncan knew exactly what the situation was, and even if the jury were to have found that Duncan did not make and subscribe this report because of the procurement of Walker, they surely would have been justified in finding that Walker aided and abetted in having it done—in having all done by Duncan that was done by him.

But it is said that the evidence is not sufficient to show that this report was sworn to by Duncan. Duncan says it was; Gill the notary says that it was. The presumption is that it was, because the notary so certifies. It is true that on cross-examination neither Duncan nor Gill show that they remember exactly what was said, but they show, as we think, enough to warrant the jury in finding that it was sworn to. No particular form of words is necessary to the taking of an oath. Witnesses in open court who are sworn to testify in trials seldom say anything, but the clerk of the court administers to them an oath, to which afterwards on their part they are held to have assented, and if having gone through with this ceremony they wilfully testify to what is false, they have committed perjury, although no word was used by them in the taking of an oath.

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After the argument of the case counsel for the defendant below made a large number of requests, which the court was asked to give in charge to the jury. The language introducing these requests reads:

"Thereupon the defendant requested the court to charge the following propositions separately and not as a series."

Then follow thirty-seven propositions so requested to be charged. Among them is No. 34. It will be seen that by the language used in introducing these requests they were to be charged separately and not as a series. This did not require of the court to pick out parts of any one of these requests and give them to the jury, unless the court found that that entire request should be given. It simply called upon the court to say whether any one or more of these thirty-seven requests should be given as a whole. This thirty-fourth request included among other things, the following: "You must assume that Duncan, when he testified, did hope that by testifying as he did he would escape prosecution and conviction." Immediately following that and as a part of the same request, is this language: "If you find that when Duncan appeared before Gill on December 2, 1908, he said to Gill, I want to swear to this statement, and that all that Gill said was, 'Is this true, Will?'" and that no other ceremony was performed, I charge you that that did not constitute the administration of a legal oath, and that you must return a verdict of not guilty."

Now whatever may be said as to the last sentence read, the court was clearly justified in declining to give the thirty-fourth request, because of the language contained in the request as hereinbefore quoted, to wit, "You must assume that Duncan when he testified did hope that by testifying as he did he would escape prosecution and conviction." There was no error in refusing to give this thirty-fourth request as a whole.

Attention is called to this language because it was especially urged upon the court in argument. What the court said to the jury in reference to the administration of an oath sufficiently instructed the jury as to what it was necessary for the state to prove in that regard. And as to each of the other requests, so far as they state the law applicable to the case, they were

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properly charged in the instruction given. There was no error in the charge of the court, nor was there any error in refusing to give the several requests.

It is further urged that there was error on the part of the court in its ruling on the admission of evidence, in this:

"When Walker was upon the stand he was asked in cross-examination by counsel for the state, if the bank did not have about eight thousand depositors. This question was objected to, the objection overruled, and an exception taken on the part of Walker. Walker then answered: 'There were between six and seven thousand as I remember.' "

We find no error in this ruling. It had developed in the evidence before this that the bank was insolvent; that it had on deposit two million dollars; that considerable more than half of this amount was loaned to the Werner Company; that the Werner Company was in the hands of a receiver, because of its insolvency, and that it, as a customer of the bank, had been permitted to overdraw to the amount of more than \$350,000; that of the overdrafts carried by the bank at the time this report was made out, other than the overdraft of the Werner Company, was about \$576.73. The state had a right in the cross-examination of Walker to search his conduct in this matter and to have it appear to the jury that the treatment of the Werner Company, of which Walker was a salaried officer, was so stupendously different from its treatment of every other depositor, and to emphasize this, that there were thousands of depositors who, altogether, had been permitted to overdraw only to this trifling amount, while this one customer was permitted to overdraw the enormous amount which it had overdrawn.

Complaint is further made that the court erred in overruling the motion for a new trial because of the language used on the part of each of the counsel for the state in his argument to the jury. Among the things counsel for the state in argument said (speaking of Walker) is:

"He is an American and entitled to your consideration; entitled to justice; entitled to no more because he sits on that side of the table; no more than if he were among the seven or eight thousand depositors who seem to sympathize in this prosecution

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with this side of the table; whose all has been swept away, we contend, by his misconduct."

It is said that this language was calculated to inflame the prejudices of the jury without being based upon any legitimate evidence. We have already said that the evidence given by Walker, upon cross-examination, that there were between six and seven thousand depositors was legitimate. The counsel in the heat of the argument used the words seven or eight thousand instead of six or seven thousand, but it can not be supposed that this difference in the number of depositors could have had any effect upon the jury. Whatever was to be drawn from the number, and whether it was six thousand or eight thousand, was immaterial. But it is said, that there is no evidence that the "all" of these depositors had been swept away by the misconduct of Walker, and through the mismanagement of this bank. As has already been said, it was shown by the evidence that these depositors had put more than two millions of dollars into this bank, and that more than one-half of it had been loaned, in violation of law, to one concern, which was shown to be insolvent, and was no such exaggeration of facts as would justify the court in holding that the language used constituted misconduct on the part of counsel to say that the "all" of these depositors had been swept away. Suppose, instead, he had said, Walker is entitled to no consideration greater than the thousands of depositors whose means to the amount of more than a million of dollars have been swept away, or whose means to the extent of more than a million of dollars have been loaned to an insolvent corporation, of which Walker was an officer; and this language would have been justified by the evidence.

Counsel for the state also said: "Every dollar of the money that he put into that company came out of the pockets of the depositors of the South Cleveland Banking Company; not a dollar of his own money went into it." We think, notwithstanding that which Walker says as to the amount that he contributed to the capital stock of the Werner Company, that when the counsel was speaking of the money which was owing by the Werner Company to the banking company, he may well be excused for using the language which he did.

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Some of the language used by the assistant prosecutor is rather picturesque, but did not constitute misconduct. In speaking of some one other than Walker, probably of Mr. Werner, who was a witness, he said:

"As soon as you drag down Captain Wagner's bank, the Akron Savings Company, you had to seek, like a vampire for new blood and new victims, and you lit upon the bank of Newberg; that is the bank that your vampire's tentacles clinched upon; that is the one that this blood sucking mouth ran into."

As already said, this language is somewhat picturesque, but it did not constitute misconduct, under the evidence. A concern which had borrowed money from one bank to a large amount and that bank had gone to the wall, and then continuously for a period of years drawn from this South Cleveland Bank to the amount of more than a million dollars, without any adequate authority, might very well justify the characterization of it as a vampire which was sucking the blood from the bank.

Complaint is made that the prosecuting attorney used this language: "Aye! There are thousands of people walking the floor now because of what Walker did. If Walker had done right and made that report right, that bank would still live and those thousands of depositors would have been saved."

To properly understand this language, it must be considered with its context. The entire sentence used by the prosecutor was as follows: "He forgot about the other side when he told how Walker walked the floor at night in wee small hours, and worried about that bank," and then follow the words complained of. There appears to have been no suggestion made when this language was used that counsel for the other side had not spoken of Walker's walking the floor at night because of the suffering he was undergoing on account of the affairs of the bank, and yet no evidence was introduced nor would it have been admissible to introduce it, to show any such walking or suffering on the part of Walker. But it having been said by counsel for Walker, as we have a right to assume it was said, because no complaint was made of the statement of the prosecuting attorney that it was said, the latter might well be excused for using the language used by him to counter-act the feeling of

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sympathy for Walker which the language used by his counsel was calculated to affect.

Without selecting further language used by counsel in the argument it must suffice to say, that after reading the arguments of both of the attorneys who represented the state, we find no serious misconduct; certainly no misconduct that would justify a reversal of the case, and painful as the duty is to contribute in any degree to the imprisonment of a fellow-citizen and especially of one who has had the respect of the community in which he lives, we feel constrained to perform that painful duty as the judge of the court below and the jury below felt called upon under their oaths to perform it, and the judgment of conviction is affirmed.

Winch and Henry, JJ., concur.

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**REPLEVIN.**

[Lorain (8th) Circuit Court, April 29, 1908.]

Marvin, Winch and Henry, JJ.

**J. D. SMITH FOUNDRY & SUP. CO. v. LORAIN COUNTY BANKING CO.**

**Right of Property or Possession Must be Found Before Judgment for Defendant Can be Entered.**

In an action in replevin, where the issues are submitted to the court without the intervention of a jury, it is error for the court to find for the defendant and assess his damages without first finding whether, at the beginning of the action the right of property, or the right of possession only, was in the defendant, and this finding must be carried into the judgment entry.

ERROR.

**MARVIN, J.**

The record in this case, for our consideration, consists simply of the transcript from the court of common pleas. The original pleadings were not filed in this court, nor have we any bill of exceptions. A motion is made here by the plaintiff in error for leave to file the original pleadings. That motion is denied. The statute provides, Sec. 6716 R. S. (Sec. 12263 G. C.), that:



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"The plaintiff in error shall file with his petition either a transcript of the final record, or a transcript of the docket and journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of."

Whether or not we might, in our discretion, permit the filing of the original papers at this time, it is not necessary here to consider. We have before us a transcript of the docket and journal entries of the court of common pleas, and if from those we find that there was error in the proceedings of the court, the judgment must be reversed.

We do find that the action was in replevin. This we find from the entry of February 19, 1907, which reads, "Original papers from C. C. Lord's docket to wit, affidavit in replevin, writ of summons, replevin bond by plaintiff, and by defendant filed." We find also from this entry that a bond was filed by the plaintiff in replevin. We further find from this transcript, by the entry of October 1, 1907, that:

"On the application of the defendant, Charles Cahoon, as constable, and the Lorain County Banking Company, that the said the Lorain County Banking Company might be substituted as the defendant in such action and it appearing to the court that the said the Lorain County Banking Company is the party in whose favor the attachment issued in the lower court, it is therefore ordered, adjudged and decreed that the defendant, the Lorain Banking Company, be substituted as a party and in the place of the said constable, and that the defendant be allowed to file an answer herein instanter."

We find here that at the trial a jury was waived by all parties, and that the cause came on to be heard before the court upon the petition of the plaintiff and the answer of Charles A. Cahoon, constable, and the Lorain County Banking Company and upon the evidence presented by plaintiff herein. At the close of plaintiff's evidence and after said plaintiff had rested the said defendants moved the court for judgment for the defendants; thereupon the court, after argument by counsel, found the plaintiff had failed in its evidence to sustain the material allegations of its petition, and thereupon, upon the application of the de-

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fendants found that the damages sustained by the said defendants were in the amount of \$350.

"Wherefore it is ordered, adjudged and decreed that the defendant, Charles A. Cahoon, recover of the plaintiff the said damages aforesaid in the sum of \$350, for which judgment is hereby entered together with the costs of the suit."

There are matters shown on this transcript which seem to be, in some degree at least, original. The banking company was substituted as a defendant in the action for Cahoon, who was sued originally as a constable. Cahoon afterwards was permitted to file an answer, and the transcript shows that such answer was a general denial. What the answer of the Lorain County Banking Co. was we can not know, because the original files are not before us. The judgment is in favor of Cahoon, but not in terms as constable, and that judgment was in his favor, after another party had been substituted in his stead as a defendant. However, the difficulty in the case is that the issues having been submitted to the court without the intervention of a jury, the court proceeded to render a judgment for the defendant, without having first found whether it was the right of property or the right of possession which was in the defendant in whose favor the judgment was rendered.

Section 5826 R. S. (Sec. 12069 G. C.), provides:

"When the property is delivered to the plaintiff or remains in the hands of the sheriff, as provided in section fifty-eight hundred and twenty, if the jury, upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only at the commencement of the suit: and if they find either in his favor, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant."

The purpose of this section is manifest, that in case the right of property is found in the defendant, and it has been taken in the proceedings in replevin by the plaintiff, the defendant will be entitled, as his damages, to the value of the property. If the right of possession only is in the defendant, it may be that his damages will be much less than the value of the property.

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For he may have the right of possession as a pledgee, or in some such way as that, but under such circumstances he would not be entitled to the entire value of the property which was taken from him. For the same reason that the jury are required to find whether it is the right of property or the right of possession which they find in the defendant, where the judgment is in his favor, the court would, when the matter is submitted to it without the intervention of the jury, find whether it is the right of property or the right of possession that is in the defendant. If it be said that where a judgment is rendered for the defendant, it must be presumed that the court made the right finding as to whether the right of property or the right of possession only was in the defendant, still the judgment fails to fix which it is, and surely the intention of the statute is that it shall be known by the judgment whether it is the one or the other that is found in the defendant. In the case of *Wolf v. Myer*, 12 Ohio St. 432, this is said by the court, quoting from the statute:

"In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find, whether the defendant has the right of property, or the right of possession only, at the commencement of the suit."

Then follows this language by the court:

"It is error for the court, in such a case, to assess the defendant's damages without the intervention of a jury, and without finding whether the defendant had the right of property or the right of possession only, at the commencement of the suit."

It will be seen by this that if the jury is dispensed with, then the court doing that which the jury (if there is a jury) is required to do, must find affirmatively whether it was the right of property or the right of possession only which was in the defendant at the time of the commencement of the action.

For error in entering judgment for the defendant without having first found whether the right of property was in the defendant or the right of possession only, the judgment is reversed and the cause remanded to the court of common pleas.

**Winch and Henry, JJ., concur.**

## Summit Circuit Court.

**GRADE CROSSINGS—STREET RAILWAYS.**

[Summit (8th) Circuit Court, October 12, 1912.]

Marvin, Winch and Niman, JJ.

**NORTHERN OHIO TRAC. & LIGHT CO. v. AKRON (CITY).****1. Constitutionality of Act Compelling Street Railways to Share Cost in Elimination of Grade Crossings.**

Sections 8892, 8893 and 8894 G. C., giving to municipalities the right to compel a street railway company to bear a reasonable portion of the cost to the municipality incurred in the abolition of railroad grade crossings, is constitutional, does not vest judicial power in a legislative body, does not deny due process of law, nor sanction the taking of private property for public uses without providing compensation.

**2. Liability of Street Railway for Elimination of Grade Crossing Determinable by Jury.**

When, upon the abolition of grade crossings in a street in which there is a street railroad, the municipality and the street railway company can not agree upon the portion of the cost to be borne by the street railway company, the municipality may, by ordinance, fix the amount to be paid by the company and institute an action in court for its recovery, but the recovery in such case will not be as upon a judgment, but for such amount as the jury shall determine to be a reasonable portion of the cost of the improvement.

[Syllabus by the court.]

**ERROR***Rogers, Rowley & Mather*, for plaintiff in error.*Jonathan Taylor*, for defendant in error.**WINCH, J.**

The sole question attempted to be reserved upon the record of this case is the validity of Sec. 8, act 95 O. L. 356, and the amendment thereto adopted April 2, 1906, 98 O. L. 192

The act of 1902 was an amendment of the original grade-crossing act of 1893, 90 O. L. 359. The first seven sections of the act of 1902 provide for the separation of grades where steam railroads cross municipal streets at grade. The constitutionality of these sections is conceded in this action.

Section 8 of the act of 1902 reads as follows:

"In case the track or tracks of any street railway company or companies within the limits of any municipality where the

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improvements authorized by this act are made shall cross at grade or otherwise a public street or the right-of-way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have power by ordinance to require such a street railway company or companies to bear a fair and reasonable proportion of the costs assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality; provided, however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks."

On August 4, 1902, the council of the city of Akron took action toward the abolishment of the Mill street grade-crossing in said city, by the erection of a viaduct over the tracks of three steam railroads where they crossed said street.

On April 4, 1904, the council passed an ordinance requiring the traction company, whose tracks were located upon Mill street, to bear one-half of the city's portion of the cost of the Mill street viaduct, reciting that one-half of the city's estimated cost of the viaduct was \$36,000.

Later in the same year an ordinance was passed approving plans for the viaduct and determining the proportion of the estimated cost of the improvement to be borne by the three railroads and the city.

Section 8 of the act of 1906 reads as follows:

"In case the track or tracks of any street railway company or companies within the limits of any municipality where the improvements authorized by this act are made shall cross at grade or otherwise a public street or the right-of-way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have power by ordinance to require such street railway company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improve-

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ment, not exceeding one-half the portion payable by said municipality; *and the municipality shall have the right of action against any such street railway company or companies for such proportion of the said cost as said ordinance shall require said company or companies to bear, and such proportion of said cost shall be a lien upon all the property, both real and personal, of the said company or companies situated in the county in which the municipality is situated from and after the date of the passage of said ordinance; provided, however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks. And the council, board of legislation or other legislative body of said municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of said improvement to be borne by said street railway company or companies.*"

The only change made by this amendment was the addition of the words in italics.

On August 3, 1908, the city passed the following ordinance:

"Section 1. That the said the Northern Ohio Traction & Light Company be and it is hereby required to bear the following amount of the said cost of said improvement, to-wit: twenty-seven thousand nine hundred and ninety-one dollars and seventy-nine cents (\$27,991.79), which said amount is hereby determined to be a fair and reasonable proportion of the cost assumed and paid by said city in the making of said improvement, and which said amount is not in excess of one-half of the part of the cost of said improvement assumed and paid by said city.

"Section 2. That, unless the said the Northern Ohio Traction & Light Company shall pay the costs to be paid to said city of Akron, the said sum of twenty-seven thousand nine hundred ninety-one dollars and seventy-nine cents (\$27,991.79) on or before eleven (11) days after the passage of this ordinance, the solicitor of said city is hereby authorized and directed to commence an action in a court of competent jurisdiction to enforce payment by said company to the said city of said sum, or to file

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a cross-petition for said purpose in a certain case pending in the Court of Common Pleas of Summit county, Ohio, entitled the Northern Ohio Traction & Light Company against the city of Akron, and being case No. 12552.

"Section 3. The clerk of council is hereby directed to give notice of the passage of this ordinance to said the Northern Ohio Traction & Light Company by leaving a copy thereof at the office of said company forthwith upon the approval by the mayor.

"Section 4. This ordinance shall take effect at the earliest period allowed by law."

Meanwhile, on December 14, 1904, the Northern Ohio Trac. & Light Co. had filed its petition in the cause now under review, asking that the city be restrained from assessing any part of the cost of said improvement against it.

After the passage of the amendatory act of 1906, the city filed its answer and cross-petition praying for judgment against the traction company in the sum of \$27,732.92, which it alleged to be one-half of that part of the cost of the viaduct assumed by the city in its agreement with the railroad companies.

A demurrer to this cross-petition being sustained, the ordinance of 1908 was adopted and a new cross-petition filed upon which the parties went to trial, other pleadings being filed by the parties in the meantime.

This cross-petition contained an allegation that \$27,991.79 was the fair and reasonable proportion of the cost assumed by the city in the making of said improvement which the traction company ought to pay.

The jury brought in a verdict in favor of the city in the sum of \$18,916.66, about \$10,000 less than the amount claimed by the city.

There is no bill of exceptions filed in this case showing the nature of the evidence introduced on the trial and the charge of the court, but attention being called to the fact that the verdict was less than the amount fixed in its ordinance by the city and claimed by it in its cross-petition, it was conceded by counsel on both sides that the court received evidence on the question of the fair and reasonable proportion for the traction company

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to pay, if anything, and charged the jury that the ordinance of the city was not conclusive upon that subject.

The small size of the verdict compels the conclusion that such must have been the case.

This fact is important, for the whole contention of counsel for the traction company proceeds upon the theory that Sec. 8 of the grade-crossing act, now found as Secs. 8892 to 8894 G. C. is unconstitutional, because it vests judicial power in a legislative body, denies due process of law and the equal protection of the law, and sanctions a taking of private property for public use without first providing compensation therefor.

If Sec. 8 must be construed as vesting in the city council the power to fix and determine the exact amount that a traction company must pay it when a separation of grades is determined upon at a crossing where street railroad tracks are upon the street, the contention of plaintiff's counsel would require more critical examination and review than seems necessary to a decision of this case, from another view of the grade-crossing act which seems tenable.

The city and the steam railroad companies are the only necessary parties to the abolishment of a grade-crossing. The street railroad company has nothing to say about the propriety of separating the grade; if the city decides that the railroad tracks must pass over or under the street and an agreement is made with the railroad company, or the mode and manner of crossing is determined according to law, the street railroad company must adapt itself to the change and go with the street, over or under the railroad tracks.

The separation of grades, however, is manifestly beneficial to the street railroad company; it renders the movement of its cars safer and quicker.

The burden of the street railroad upon the street increases the cost of the change, particularly in the case of a viaduct, for it must be built of a width to accommodate the tracks and the general public, and of a strength to sustain the heavy traction cars, which weigh many tons more than other vehicles.

It would seem that for the benefits thus received the traction company should pay, even in the absence of a statute on the sub-



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ject, and the statutes under consideration are only a declaration of what natural justice should require, even though no decisions on the subject have crystallized the law of the land with respect to such conditions. This statement, of course, applies only to the declaration of the rights of the parties under the relations created by the necessity for a separation of grades; it is not meant as authorizing one of the parties to determine the liability of the other, finally and without other formality.

Now, with this view of the law, what did Sec. 8 of the act of 1902 provide? That "the municipality shall have power by ordinance to require such street railroad company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality."

This authorizes the city to come to an agreement with the street railroad company as to what is fair and reasonable for it to pay and to settle with it for that amount, the action of the city being confirmed by ordinance, a proper and formal way of recording its action. The limitation "not exceeding one-half the portion payable by said municipality," is for the benefit of the street railroad company.

This section does not specify how the city shall require the street railroad company to pay; it does not authorize the city by ordinance to determine what amount is fair and reasonable.

It seems that this section would authorize the city, if it could not come to an agreement with the street railroad company as to how much it should pay towards the improvement to "require" it to pay a fair and reasonable proportion thereof by proceeding against it according to law.

Suit brought, as in this case, by the filing of a cross-petition setting up all the facts with regard to the improvement, its cost and the benefits supposed to flow to all the parties therefrom, leaving to a jury under the direction of a court to determine from all the facts presented in evidence what was fair and reasonable for the street railroad company to pay, if anything, under all the circumstances, would be according to law and violate none of plaintiff's constitutional rights.

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The presumption is in favor of the judgment in this case and such a trial must have been had.

This view of the statute makes it constitutional. It is a universal rule in the construction of statutes that they shall be held by the courts to have a constitutional operation if it is possible to give them such operation.

The amendment of Sec. 8 in 1906, was an effort to make this effect of the act of 1902 clearer, but it is doubtful if it has served such purpose. The words then inserted were: "and the municipality shall have the right of action against any such railway company or companies for such proportion of the said cost as said ordinance shall require said company or companies to bear."

If this amendment means that the city can sue for the amount determined by its ordinance as upon a judgment and recover that amount or more, then the amendment might be invalid. If it means that the city might by ordinance determine what was fair and reasonable in its judgment for the street railroad company to pay, being unable to agree with the company on the amount, if any, which it in justice should pay, present a bill therefor, and, if not paid, sue on such bill, then it would be constitutional. It would be according to the practice of all creditors, who make out their own bills and, if not paid, sue on them, claiming the full amount that they themselves think ought to be paid. At the trial the proper amount due the plaintiff is determined, without regard to what he thinks he should receive.

That course, we understand, was followed in the trial here under review.

An examination of the ordinance of August 3, 1908, shows that it was a mere statement of what the council thought the traction company should be required to pay as its fair and reasonable proportion of the cost of the improvement, and that said amount was not more than one-half of the cost assumed and paid by the city with directions to its attorney, the city solicitor, to bring suit for that amount if it was not paid in eleven days after the claim was presented to the company.

We are not required to give this ordinance or the law under which it was passed an unconstitutional effect, and the trial court gave it no such effect, though the plaintiff in error seeks a

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strict construction of the law and its application in an unconstitutional manner so that it may escape the payment of an obligation for which a fair interpretation of the law makes it liable.

Judgment affirmed.

**Marvin and Niman, JJ., concur.**

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### RESCISSION.

[Summit (8th) Circuit Court, October 12, 1912.]

Marvin, Winch and Niman, JJ.

**CHARLES MALLISON V. DANIEL DUERR AND ELIZABETH MAHONEY.**

**Rescission of Sale of Land Under a Mistaken Impression as to the Boundaries.**

Where it appears that there was no meeting of the minds of the parties to a contract for the purchase of land, due to the fact that the purchaser thought the boundaries included certain land not in fact included but which the purchaser desired for a particular purpose, an abatement of the purchase price not furnishing adequate relief, a rescission of the contract will be granted.

[Syllabus by the court.]

APPEAL.

*J. A. H. Myers and C. L. Dinsmore*, for plaintiff.

*Wilcox, Burch & Adams*, for defendant.

### **MARVIN, J.**

Mallison purchased a tract of land from Duerr, directing that it should be deeded to a relative, Elizabeth Mahoney. At the time this agreement to purchase was made, Mallison and Duerr went upon the land. Duerr owned land in the township and village of Cuyahoga Falls, bounded on the north side by Front street, on the south side by the Cuyahoga river, and on the east side by the boundary line between Cuyahoga Falls and Stow townships.

This land was all originally in Stow township, but something like sixty years ago the township of Cuyahoga Falls was established, being made up from Stow and other townships. There

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was no visible mark to fix just where this boundary line was. Duerr and Mallison both understood that Duerr's land was all in Cuyahoga Falls, but we think it plain, from the evidence, that both supposed the line to be considerably east of where it really was.

Duerr says he told Mallison he didn't know which of two stones which he pointed out was on the line. As a matter of fact neither of these stones was on the line; both were too far east.

Duerr shows by his testimony that he understood that Mallison was buying expressly that he might have a boat landing on the river front. He says 26 feet would be enough for a boat landing, and that he, Duerr, spoke of 26 feet as a sufficient boat landing.

A deed was made out by Duerr and delivered to Mrs. Mahoney, making the east boundary the township line. As already said, this was considerably east of both the stones pointed out by Duerr, and reduces the river front to much less than 26 feet; in fact, it practically leaves no room for a boat landing.

There is a mistake, too, in the west line as it appears in the deed. This is agreed to by all parties, and if this were the only difficulty it would be easily corrected as a mutual mistake; but Duerr did not own the land which Mallison says he supposed he was getting. He did not own as far east as either of the stones pointed out, so that if Mallison is entitled to any relief here it can not be given him by a decree of specific performance.

We think it clear that he is entitled to relief; there would remain but two means of giving the plaintiff proper relief, to wit a rescission of the contract or an abatement from the consideration. The latter would not be adequate and proper relief when we take into account the fact that the inducing cause operating upon the plaintiff to make the purchase was that he might have a suitable river front for a boat landing. Giving him the land only which the defendant could have given him, he fails to get this river front. The purpose for which he purchased the property failed, and he would not be made good by a recovery back of a proportionate share of the purchase money. In such case we understand the plaintiff to be entitled to a rescission of the contract.

## Mallison v. Duerr.

In the case of *Stewart v. Gordon*, 60 Ohio St. 170 [53 N. E. 797], it is said in the second paragraph of the syllabus:

“Where a grantor is mistaken as to the size of a particular tract of land from which a given number of acres in rectangular form are to be taken, but the grantee is not, the fact that the grant so made includes a house both understood was not to be included, is ground for a rescission of the grant, but not for reformation of the deed.”

On pages 174 and 175 in the opinion in this case, prepared by Judge Minshall, this language is used:

“The evidence in this case fails to disclose that it was a mutual mistake. There was a mistake in this, that the plaintiff and her husband both testified that the eleven acres were to be taken off of the east side of the southwest quarter of the southeast quarter of the section named, but so as not to include the house. The defendant, on the other hand, testifies that it was to be taken off of the north side, whether it included the house or not. He was not certain at the time whether it included the house. Both parties agree that whether taken from the east or north side, it was to be in the form of a rectangle; there was no treaty for anything else. The court, however, found with the defendant, that it was to be from the north side and that both parties mutually understood that it was not to include the house, and permitted the petition to be amended so as to support a finding that the eleven acres were to be taken from the north side so as not to include the house.

“The plaintiff thought it was to be taken from the east side so as not to include the house and lot. The defendant understood that it was to be taken from the north side. As to this the court found with him, but found that he understood that it was not to include the house. And then finding that this could not be done so as to convey the requisite number of acres in the shape understood by both parties, decreed it to be taken from a side conforming to the understanding of one of the parties, and in a form different from the understanding of both. It is not competent for a court to determine the contract that should have been made and decree its performance. Parties must be left to

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make their own contracts. The most the court can do, in exercising the power of reformation, is to clearly ascertain what the contract was and to correct such mutual errors as have intervened in carrying it into execution. The evidence in the case would doubtless have warranted a rescission had suit been brought for that purpose."

In the present case suit is brought for the rescission of this contract. It is a case where the minds of the parties did not meet; it is a case which, as already pointed out, can not be corrected by decreeing a specific performance, even if the minds of the parties had met, because Duerr did not own the land which Mallison supposed he was getting, and, as has also been pointed out, an abatement from the purchase price would not do justice to the plaintiff.

We reach the conclusion, therefore, that the plaintiff is entitled to have the contract rescinded.

The defendant Duerr having died during the progress of this action and his successors in title having been made parties, including also the executor and his widow, the decree must be against them. We have examined the decree entered in the court of common pleas, and the same decree may be taken here.

**Winch and Niman, JJ., concur.**

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**CRIMINAL LAW—FALSE PRETENSES.**

[Cuyahoga (8th) Circuit Court, February 13, 1912.]

Marvin, Winch and Niman, JJ.

J. A. C. GOLNER V. STATE OF OHIO.

**1. Three Counts Averring False Pretenses in Representing Ownership of Property not Inconsistent or Repugnant.**

Three counts in an indictment for obtaining property under false pretenses are not inconsistent or repugnant, the first of which charges that it was falsely represented that Snyder owned property on the lake shore east of Cleveland, the second that Pollock owned property on the lake shore east of Cleveland and the third that Snyder and Pollock jointly owned certain property, describing it, on the lake shore east of Cleveland, the title being in Pollock with authority from Snyder to convey.

**Golner v. State.****2. False Pretense in Obtaining Deed Though not Possession of Land.**

The crime of obtaining property under false pretenses is made out, if the property obtained unlawfully under the false pretenses is a deed selling and conveying a farm to another, though possession of the farm was never surrendered by the prosecuting witness.

**3. Cross Examination of Witness to Shady Transaction, Assuming his Connection, not Ground for Reversal.**

The cross-examination of a defendant in a criminal case who offers himself as a witness, as to shady transactions which the questions assume he was connected with, such cross-examination being solely for the purpose of testing his credibility, is limited only by the sound discretion of the court, and a judgment will not be reversed for permitting such cross-examination, unless it appears from the record that such discretion was abused to the prejudice of the accused.

[Syllabus by the court.]

**ERROR.**

*Westenhaver, Boyd, Rudolph & Brooks*, for plaintiff in error.

*J. A. Cline and W. D. Meals*, for defendant in error.

**WINCH, J.**

Plaintiff in error was convicted of obtaining property under false pretenses from one E. W. Reeves, who was the owner of a farm of 168 acres in Brecksville township, Cuyahoga county, Ohio.

While numerous false representations are alleged in the indictment to have made and to have induced Reeves to part with title to his farm, only three of them were submitted to the jury under the charge of the court. They are as follows:

"That the said Arthur L. Snyder was then and there the owner of a valuable tract of land which had a frontage on the shore of Lake Erie east of the city of Cleveland, Ohio; that said Arthur L. Snyder had then and there paid for said real estate east of the city of Cleveland, Ohio, the sum of more than \$10,800; that said Arthur L. Snyder had then and there a good and lawful title to said real estate east of the city of Cleveland, Ohio, on the shore of Lake Erie, in his own name.

"That said F. Pollock was then and there owner of a valuable tract of land which had a frontage on the shore of Lake Erie, which real estate was situated east of the city of Cleveland,

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Ohio; that said F. Pollock had then and there paid for said real estate east of the city of Cleveland, Ohio, on the shore of Lake Erie, the sum of more than \$10,000; that said F. Pollock then and there had a good and lawful title to said real estate east of the city of Cleveland, Ohio, aforesaid, in his own name.

"That certain real estate situated in Willoughby township, Lake county, Ohio, and known as part of land allotted by the Willoughby Land & Improvement Company, in tract No. 16, and being lots Nos. 67, 68, 69, 70, 71, 72, 131, 132, 133 and 136, in tract No. 16 of said company's survey, and recorded in Lake county, Ohio, records of plats, was then and there located on the shore of Lake Erie and was worth the sum of \$10,000 and was jointly owned by said Arthur L. Snyder and F. Pollock and that the title to the same was in the name of F. Pollock and that F. Pollock had been authorized by said Arthur L. Snyder to convey the same by deed to E. W. Reeves; that scows had been sunk in Lake Erie off the shore of and near real estate which was owned by the said Arthur L. Snyder; that additional land was forming in Lake Erie by reason of said sunken scows and that said land which was forming would be joined to the land owned by said Arthur L. Snyder."

It will be noticed that it is not alleged that the land on the shore of Lake Erie represented to be owned by Snyder was the same land represented to be owned by Pollock nor is it alleged that the ten lots in the Willoughby Land & Improvement Company's allotment were represented to be the same land as that previously represented as owned by Snyder or by Pollock.

On the trial it was shown in evidence that Golner, having opened negotiations with Reeves with reference to his farm, introduced Snyder to him and the latter, by arrangement with Golner, took Reeves out in an automobile to stop 130½ on the Shore Line Electric Railroad, and there pointed out to him ten lots, five of which bordered the lake for five hundred feet, and falsely represented to Reeves that he owned the said lots.

Snyder also told Reeves that he had paid \$10,800 for said lots, and he proposed to give Reeves a mortgage on them in payment for the equity in Reeves' farm, the latter being under mortgage.



## Golner v. State.

Negotiations proceeded for several days, Golner being present and participating in some of them, but Snyder became apprehensive of the situation he was getting into and dropped out of the negotiations.

Thereafter Golner introduced Reeves to Pollock, representing that while Snyder owned the lots, the title was in Pollock, and Pollock was authorized to convey, and Reeves agreeing to the deal, Pollock gave him a mortgage on the ten lots therein described, representing that they were the lots on the lake front at stop 130½, whereas in fact they were ten miles from there and not on the lake front.

Reeves delivered the deed of the farm to Pollock and received the mortgage in question securing certain notes which, it was agreed between Golner and Pollock, should be endorsed by Snyder, but Snyder never endorsed them.

In this state of the evidence it is claimed that there is a repugnancy in the representations relied upon for a conviction, not apparent on the fact of the indictment; that the representation that Snyder owned the lots at stop 130½ is repugnant to the representation that Pollock owned the same lots, and that this repugnancy became material and developed prejudicial error in the charge of the court, for the court charged more than once that the jury might convict if they found *any one or more* of these representations had been made.

This claim of error is somewhat difficult to grasp and express, but may be clearer, perhaps, if stated as follows:

"The court might properly have charged that the jury might convict if it found that the representation had been made that Snyder owned the lots, *or* if it found that the representation had been made that Pollock owned the lots, but it could not convict if it found that both representations had been made, because they are inconsistent and repugnant; both can not be true; one contradicts the other."

One answer to this is that the jury might well have found from the evidence that the representations were not as to concurrent ownership by Snyder and Pollock. It was first represented that Snyder was the owner and thereafter that Pollock

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was the owner. There is nothing inconsistent in such representations, if it was represented that meanwhile title had passed from one to the other, and said suggestion is borne out by the evidence.

Nor can it be said that if the jury should find that it was represented that Snyder once owned the lots and thereafter Pollock owned them, that the representation that Snyder owned them ceased to be material and would not warrant a conviction, for there is another aspect of the representation regarding Snyder's ownership—such representation tended to mislead Reeves into a belief that he was dealing with men of substantial means and evident financial responsibility. He might properly conclude that though Snyder had conveyed the lots to Pollock, the latter had paid value for them which would leave Snyder worth as much in money as he had been worth in land, and he was to have Snyder's endorsement on the notes.

This thought becomes more important in consideration of the next assignment of error.

It is claimed that the indictment does not charge Golner with the crime which the record shows was committed by him.

On this proposition it is argued by counsel for Golner that the only false representation which had a decisive influence upon the mind of Reeves and caused him to part with his property was the representation that the lots described in the mortgage were, in fact, the lots located at stop 130½ which had been pointed out to him by Snyder; that it was this belief which caused him to part with his title; that without this belief he would not have parted with it, and this false representation is nowhere charged in the indictment, for the indictment alleges only that it was represented that the lots described in the mortgage were on the lake front, and not that they were at stop 130½ and were the same lots pointed out by Snyder.

There is some degree of sophistry in this argument.

We can not know with certainty that only one of the many false representations made to him had a decisive influence upon the mind of Reeves. It may have been and it probably was all of them together which brought about that state of mind which induced him to part with his title.

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It is but a matter of evidence that the land represented as owned by Snyder, and pointed out to Reeves at stop 130½ and then represented as owned by Pollock, is the same land as that which was represented as being lake front property and included in the mortgage.

It was alleged in the indictment that it was represented that Snyder was the owner of a valuable tract of land which had a frontage on the shore of Lake Erie east of the city of Cleveland. It was shown in evidence that the land Snyder was represented to own was at stop 130½.

It was alleged in the indictment that Pollock was the owner of a valuable tract of land which had a frontage on the shore of Lake Erie, which real estate was situated east of the city of Cleveland. It was shown in evidence that the land Pollock was represented to own was at stop 130½.

It was alleged in the indictment that the ten lots described in the mortgage were represented as located on the shore of Lake Erie. It was shown in evidence that the particular place on the shore of Lake Erie where they were represented as located was at stop 130½.

There was proof, then, of each representation, and, if the indictment alleges a crime, that crime was proved.

As already said, the representation as to Snyder's ownership of lake front property was not only material as connecting his representation with Reeves' mistake in supposing the land described in the mortgage was on the lake front, but as inducing him to believe that Snyder was a man of financial responsibility and so, that he could trust him and those who claimed to represent him and be interested with him.

The same may be said of the representation as to Pollock's ownership of the land.

As to the representation that the land described in the mortgage was upon the lake front, that was material, for it is a matter of common knowledge that lake front property near the city has an increased value by reason of said frontage. Its exact location at stop 130½ was not so material, and we can not say that Reeves would not have been induced to part with his property if the land he supposed was described in the mort-

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gage had never been pointed out to him, but all that had been represented was that it had a lake frontage.

The questions thus far discussed cover many of Golner's requests to charge which the court refused to give, and reference will therefore be made only to those requests which involve other questions.

By request number 17 the court was asked to charge that representations regarding the lands described in the mortgage, so far as they related to the *joint* ownership of said lots and the authority of Pollock from Snyder to convey said lots to Reeves, were *wholly immaterial* because it is not denied in the indictment that *Pollock* had title to said lots, and full authority to convey the same, though the truth of the representation as stated in the verdict is negatived in the indictment.

The representations of joint ownership of Snyder and Pollock and Pollock's authority to convey are not wholly immaterial, for they connect up with the former representations that Snyder was the owner, and make plain the whole scheme of deception planned by Golner, one inducement and one representation naturally leading on to another, the whole having such consequence as to induce Reeves to part with his property, but being so insidiously interwoven that we can not say that any one representation would have induced Reeves to act, or that he would not have acted if any one representation had not been made. This inquiry was properly put before the jury for its final answer.

Pollock's sole and undivided ownership of the lots described in the mortgage needed no denial, for no such representation had ever been made to Reeves. If it had been made it would undoubtedly have made him suspicious, for he had previously been told a different story.

By the twenty-second and twenty-third requests the jury's attention was called to the defendant's claim that Reeves never parted with the possession of his farm.

As the charge in the indictment was only that by reason of the false pretenses, the defendant unlawfully obtained from

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Reeves a deed of general warranty, selling and conveying his farm to Pollock, these requests were properly refused. *State v. Toney*, 81 Ohio St. 130 [90 N. E. 142; 18 Ann. Cas. 395].

The defendant twice submitted his requests to charge, once before argument and again, the same requests, after argument.

The court refused to give the requests before argument though some of them were given after the argument.

We are content to let this question rest upon the decision in the case of *Umbenhauer v. State*, 2 Circ. Dec. 606 (4 R. 378), where it was held:

"Upon the trial of a *criminal* case it is not error for the court to refuse to instruct the jury, at the request of the defendant, upon matters of law, before the argument begins."

That case was affirmed by the Supreme Court, no opinion, *Umbenhauer v. State*, 23 Bull. 167.

The defendant submitted himself as a witness in his own behalf and was cross-examined by the prosecuting attorney; in that cross-examination he was asked many questions with regard to a shady transaction about some Beach City bonds, with which the state tried to connect him. Most of his answers were denials but it is claimed that it was wrong to permit inquiry as to this collateral matter, for it amounted to an attempt to prove another distinct offense, for the purpose of raising the inference of the prisoner's guilt of the particular crime charged, which would be prejudicial error, as explained in the case of *Hanoff v. State*, 37 Ohio St. 178, 180 [41 Am. Rep. 496].

A reading of the remainder of said opinion, however, shows that such examination of a witness, whether defendant or not, for the purpose of testing his credibility, rests in the sound discretion of the court, and a judgment will not be reversed for permitting such cross-examination, unless it appears from the record that such discretion has been abused to the prejudice of the party.

There was no such abuse of discretion in this case; such answers as Golner gave to questions asked him probably tended to shake the confidence of the jury in his credibility and were legitimate for that purpose.

The weight of the evidence in this case is so overwhelming

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as to the guilt of plaintiff in error, that that question has not been raised in this court. The several technical objections raised by his counsel have not been without difficulty, but, being of opinion that there is no reversible error in the record, the judgment is affirmed.

**Marvin and Niman, JJ., concur.**

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**CONTRACTS—PLEADING—RELEASES.**

[Lucas (6th) Circuit Court, February 10, 1912]

Richards, Wildman and Kinkade, JJ.

CHARLES A. BROWN V. HARRIET E. FARR.

**1. Failure of Petition to Allege Amount Due not Fatal Defect.**

A judgment will not be reversed solely by reason of a defect in the petition in failing to aver that the amount claimed is due, where issues have been joined and the cause tried on its merits and it appears from the record that the defective petition did not result in prejudice to the adverse party.

**2. Release Relied Upon as Defense Obtained Through Misunderstanding Requires no Separate Action to Cancel.**

Where it is clearly apparent that the plaintiff was led to sign the release relied upon by the defendant through a misunderstanding as to its character, or it appears that the instrument signed was a mere nudum pactum, it is not necessary to set the instrument aside by a separate action nor to demand a cancellation of such release by a separate cause of action.

**3. Claim for Services Rendered by Member of Family must be Established by Unequivocal Proof.**

No contract to pay for services can be implied where a family relationship existed between the parties, but such a contract must be established by clear and unequivocal proof; and this rule is as applicable to an action against the head of a family during his lifetime as against his administrator after his death.

**ERROR.**

*Ray & Cordill*, for plaintiff in error.

*James H. Southard*, for defendant in error.

**RICHARDS, J.**

The original action in the court of common pleas was brought by Harriet E. Farr to recover of Charles A. Brown upon two causes of action set forth in her petition. In the first

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cause of action she claimed a balance of \$5.50 upon a promissory note executed by Brown to her. In the second cause of action, she claimed a sum of about \$750 for services claimed to have been rendered by her to Brown.

It appears from the evidence that Harriet E. Farr, had been an inmate of the Children's Home near Maumee, and that she was indentured to Brown until she was eighteen years of age, at which time he was to pay her the sum of \$50, and that she continued to reside in the family of Brown as a member thereof for some years after she became of age. Upon her arriving at the age of eighteen he executed to her a note in the sum of \$50 upon which he subsequently paid \$10, and upon September 25, 1909, he paid to her the sum of \$44.50. The trial in the court of common pleas resulted in a verdict and judgment in her favor in the sum of \$313.50. At the time the payment of \$44.50 was made, she signed an instrument which she delivered to Brown, reading as follows:

"SWANTON, OHIO, September 25, 1909.

"Received of Charles A. Brown the sum of fifty (\$50.00) dollars, the same being in full payment and settlement of note given by him to me of date of March 26, 1908, and said sum is also in full payment of any and all claims of every kind and description which I have against him.

"MISS HARRIET E. FARR."

Miss Farr alleges in her reply after quoting the above instrument that the defendant desired to settle the balance of the note and that he represented to her that he had seen her attorney and that her attorney sent word that she should accept the balance due on the note, and that she should sign the said paper. She avers that Brown said to her that said paper receipt related to, covered and was intended to settle said note, and such matters as grew out of their indenture agreement and nothing else, and that a receipt was necessary because the note was lost. She further avers that it was not true that her attorney had directed that she should sign the paper, but that he had sent no directions whatever, and that she was induced to sign the

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instrument through the false and fraudulent representations of said defendant, communicated to her as just stated.

Upon the impaneling of a jury in the common pleas court, the defendant below objected to the introduction of any testimony for the reason that the pleadings showed that there was a settlement between the parties and a contract of settlement entered into and set up in the answer and admitted in the reply, and that this contract must stand until set aside by a court of equity. The defendant upon the overruling of that motion, further moved the court for judgment on the pleadings which motion was also overruled, and exception taken to the action of the court upon both motions.

The petition contains no averment that the amount of \$5.50 which is claimed upon the promissory note was due; neither is it averred in the petition that the amount claimed in the second cause of action for services was due, but the second cause of action does contain the averment that the defendant is indebted to her upon the claim therein set forth. The reply contains an averment that she had presented to Brown a statement of the amount due her for services and that he was not disputing that she was entitled to receive from him the amount due on the note.

In view of these allegations and of the language of the Supreme Court in *Yocum v. Allen*, 58 Ohio St. 280 [50 N. E. 909], and also in the case of *Dayton Insurance Co. v. Kelly*, 24 Ohio St. 345 [15 Am. Rep. 612], we think that the judgment ought not to be reversed by reason solely of the defects in the pleadings just stated, and that the action of the court in that respect was not such prejudicial error as to require a reversal.

It is insisted, however, that the instrument quoted above, if its validity is to be questioned at all, should be questioned by appropriate allegations contained in the petition rather than in the reply. The instrument itself is plainly in form something more than a receipt and amounts, without doubt, to a contract as well as a receipt. See *Jackson v. Ely*, 57 Ohio St. 450 [49 N. E. 792]; *Cassilly v. Cassilly*, 57 Ohio St. 582 [49 N. E. 795]. The rule by which it is to be determined whether an



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instrument of the character set forth must be assailed in the petition, or whether it may be sufficient to set it up in the reply, depends upon whether it is a void instrument or one which is voidable only. The principle of law controlling is laid down by the Supreme Court in *Perry v. O'Neil & Co.* 78 Ohio St. 200 [85 N. E. 41]. A careful examination of the language of the reply leads to the conclusion that if Miss Farr believed the statements to be true, she was led to sign the instrument because she believed it was one of a different character from the one which it was in fact. It is perfectly apparent that she is not a woman of the keenest business sagacity, and that she acted upon the supposition that the instrument was nothing other than a receipt for the amount due upon the note. Such being the case, the instrument would be absolutely void and it would not be necessary to set the same aside either by a separate action or by a separate cause of action in this case, before maintaining an action to recover the amount claimed by her.

An additional reason exists which is sufficient to justify us in reaching that conclusion. The amount actually paid was \$44.50 and beyond all question, at least that amount remained due upon the promissory note and was not in any way in dispute between the parties. It was a liquidated sum and nothing having been paid upon the promissory note, in addition to the amount conceded, no consideration existed for a release of the amount claimed to be due for services. The instrument, therefore, in so far as it purports to be more than a receipt, would be absolutely void. It would be what lawyers term a *nudum pactum*. See *Seeds, Grain & Hay Co. v. Conger*, 83 Ohio St. 169 [93 N. E. Rep. 892; 32 L. R. A. (N. S.) 380]. We find no prejudicial error to have been committed by the trial court in overruling the motions made by the defendant below for judgment upon the pleadings and for the exclusion of all evidence.

Upon the trial of the case a large amount of evidence was introduced pertaining to the relations existing between the plaintiff below and the family of Charles A. Brown, and to the services performed by her. From the evidence, it appears that from the time she went to live in the family, she continued to reside

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in the family as a member thereof. She alleged in her reply that she had lived in the family since childhood and that the defendant had occupied the position of a father toward her. The case as made by the allegations contained in the second cause of action, and the pleadings subsequent thereto is one where during the existence of a family relation one member has performed services for the head of the family, and seeks to recover therefor. In the general charge of the court, we find this language:

"The burden is upon the plaintiff as to both causes of action, to prove by a preponderance of the evidence the allegations of her first and second causes of action before she can recover upon them. \* \* \* Before she can recover on the second cause of action, she must prove that there was an agreement between herself and defendant, either express or implied, that she should perform services and that she should be paid for such services."

In view of the circumstances shown by the evidence in this case as to a family relationship existing between the parties to the case, it was manifest error to instruct the jury as was done in the language above quoted. It has long been the established rule in cases of this character that no contract to pay for services rendered would be implied, and that before a recovery can be had, it must appear from the evidence that an express contract to perform the services and to pay for the same existed. The language quoted would authorize a recovery in the absence of an express contract. Again, the instruction permits a recovery if the plaintiff's case on the second cause of action is established by a preponderance of the evidence only. This language is in direct conflict with the rule laid down by the Supreme Court in *Hinkle v. Sage*, 67 Ohio St. 256, 262 [69 N. E. 999]. In the case cited the principle is announced by our Supreme Court that to entitle a plaintiff to recover under such circumstances, the contract must be established by clear and unequivocal proof. It is true that the case of *Hinkle v. Sage*, *supra*, was an action brought against the estate of a decedent, and in that respect it differs from the case now under consideration. But the language used by the court in the course of the opinion, and also

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as found in the syllabus is so broad as to embrace an action of this character, whether brought against an executor or administrator or against the head of a family during his lifetime. Were it not for this general language, the members of this court might not be agreed that the rule requiring the plaintiff's case to be established by clear and unequivocal proof should be applied except when the action is against the estate of a deceased person. Much argument may be adduced upon both sides of the question, but we are convinced, in view of the language of this decision, that the rule in our state is equally applicable whether the action be against an administrator or between members of a family still living. A very interesting discussion of this and some other questions may be found in an exhaustive note contained in *Hodge v. Hodge*, 11 L. R. A. (N. S.) 873-913 [47 Wash. 196; 91 Pac. 764]. Speaking of the degree of proof required the annotator upon page 902 states the rule as follows:

"The emphatic language used is probably to be accounted for, in some measure at least, by the fact that, in the great majority of instances, it was used with relation to claims against the estates of decedents. But, as the statements of the courts are perfectly general, it can not be assumed that the standard specified was regarded as being appropriate only in cases involving such claims."

For the error indicated, prejudicial to the rights of the plaintiff in error, the judgment will be reversed and the cause remanded for further proceedings.

**Wildman and Kinkade, JJ., concur.**

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**CORPORATIONS.**

[Cuyahoga (8th) Circuit Court, February 12, 1912.]

Marvin, Winch and Niman, JJ.

**AMERICAN SHIPBUILDING CO. v. FRANK P. WHITNEY.****Stockholder of Foreign Corporation has Right to Inspect Records and Papers.**

A stockholder of a foreign corporation which is doing business in Ohio, after having obtained the right to do so by complying with the laws which provide how a foreign corporation may do business in this state, and has records and papers within the state, has all the rights of inspection of such records and papers as a stockholder in a domestic corporation has.

**ERROR.**

*Griswold & White* and *Thompson & Hine*, for plaintiff in error.

*Hoyt, Dustin, Kelley, McKeehan & Andrews*, for defendant in error.

**MARVIN, J.**

The American Shipbuilding Company is a corporation for profit, organized under the laws of the state of New Jersey. It is doing business in Ohio, having obtained the right to do so by complying with the laws which provide how a corporation, organized under the laws of another state, may do business in this state. It has property, offices, records and papers here.

Frank P. Whitney is a stockholder in said corporation. He resides here. He has demanded of the officers of said corporation an inspection of certain records and papers of the corporation now in Ohio. This inspection has been refused. His demand for such inspection is not accompanied by any reason given by him for such inspection except that he is a stockholder in the corporation.

He brought a suit in the court of common pleas seeking an injunction against said corporation and its officers to prevent their refusing him this inspection. The corporation bases its refusal upon the ground that until the stockholder shall show

## Shipbuilding Co. v. Whitney.

a reason for this inspection, he is not entitled to it. The court of common pleas decided in favor of the stockholder and granted the injunction, and the proceeding here is for the purpose of determining whether such order of the court shall be sustained.

It is provided by Sec. 8673 G. C., that "the books and records of such corporations, at all reasonable times, shall be open to the inspection of their stockholders." This section is found in the chapter providing for the organization and conduct of corporations for profit in Ohio. There is no doubt, therefore, that if this were an Ohio corporation, the stockholder would be entitled to the examination. This is absolutely settled by the case of *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189 [56 N. E. 1033; 48 L. R. A. 732; 78 Am. St. 707]. The syllabus of this case reads:

"Injunction is the proper form of remedy to enforce the right of a stockholder in a private corporation, given by Sec. 3254 R. S., to inspect the books and records of the corporation.

"The right to inspect does not depend upon the motive or purpose of the stockholder in demanding such inspection and a petition which shows that the plaintiff is a stockholder; that he has requested the defendant to allow him to inspect the books and records of the corporation, and fix a reasonable time for the same, which request has been refused, states a cause of action.

"As incident to such right is the right to have such inspection by a proper agent, and to take copies from such books and records."

It is urged, however, that the statute does not apply to foreign corporations, because the language is that the "books and records of *such* corporations" shall be open to the inspection provided for, and that the word "such" refers to the kind of corporations provided for in the chapter, to-wit, domestic corporations.

It is, however, provided in Sec. 5508 G. C., as amended in 102 O. L., 251, Sec. 119 of the amendment, in these words:

"All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities and restrictions that are or may be imposed upon cor-

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porations of like character organized under the laws of this state, and shall have no other or greater powers."

That this applies to all foreign corporations, other than certain ones named later on in the section, is clear from the fact of those exceptions being made.

We have not found it necessary to consider other questions raised in this case. We regard the case as settled by these statutes and the decision of the Supreme Court already named. The result is that the judgment of the court of common pleas is affirmed.

**Winch and Niman, JJ., concur.**

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**BENEFICIAL ASSOCIATIONS—INSURANCE.**

[Cuyahoga (8th) Circuit Court, February 13, 1912.]

**Marvin, Winch and Niman, JJ.**

**BLANCHE MAHAR V. ROSIE MAHAR ET AL.**

**Divorced Wife not Entitled to Benefits From Fraternal Association.**

Under Sec. 9467 G. C., payment of death benefits by a fraternal beneficiary association can not be made to one who was the wife of the member when a certificate was issued to him, and named therein as his beneficiary, without after change, but was divorced from him before his death and hence before the death benefits became payable.

**ERROR.**

*Hidy, Klein & Harris*, for plaintiff in error.

*E. P. Strong, J. D. Clark and George C. Johnson*, for defendants in error.

**MARVIN, J.**

The Independent Order of Foresters filed its petition in the court of common pleas, alleging that it is a fraternal beneficiary association, organized under the laws of the Dominion of Canada, and doing business in Ohio by authority of law. That on January 19, 1909, one William Mahar died, being then a member of said association, to whom it had theretofore issued a benefit certificate in the sum of one thousand dollars, which was then in full

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force, and setting out that it was ready to pay said sum to the person entitled to receive the same, and brings the amount into the court to abide its order. That Blanche Mahar and Rosie Mahar each claimed payment of this benefit fund to herself, and so the question of the party entitled to the payment was submitted to the court.

Both of these parties answered, each setting up facts which she claimed entitled her to the money. The court ordered that Rosie Mahar was entitled to it and made its order accordingly. To this finding and order Blanche Mahar prosecutes this proceeding in error.

The facts are these: one William Mahar and the plaintiff in error, Blanche Mahar, were married June 20, 1900, at Lorain, Ohio. Soon after their marriage and in November, 1901, the said William Mahar became a member of Court Huntington-tower No. 3835 I. O. F. and took out insurance in the sum of \$1,000, which insurance under the mortuary certificate was made payable to Blanche Mahar, the plaintiff in error, who was then his wife. The parties lived together from that time on until 1908 when they separated and the said William Mahar secured a divorce from his wife in the court of common pleas of Cuyahoga county, Ohio. Thereafter the said William Mahar, on or about December 2, 1908, married the defendant in error, Rosie Mahar, and the following month, to-wit, January 19, 1909, died, and during all of the time aforesaid the said William Mahar resided either in Cleveland or in Lorain, Ohio. The beneficiary was at no time changed. The policy now reads, and the certificate evidencing the insurance is made payable to Blanche Mahar, the plaintiff in error. No children were born to either the plaintiff in error or the defendant in error.

The contention on the part of the plaintiff in error is that Blanche Mahar, having been designated originally as the beneficiary in the beneficial certificate, and no change of beneficiary having been made, as it could have been made by William Mahar had he applied to the association to have such change made, the person entitled to payment remains unchanged, and so the court should have ordered that the money be paid to Blanche; whereas, on the other hand, it is argued that though Blanche was named as

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the beneficiary in the certificate, yet the fact of the divorce of William from her took away from her all right to any payment under this certificate.

The certificate itself provides, among other things:

"The supreme court doth further agree, subject to the proviso hereinafter contained, on the death of the said member being established to the satisfaction of the executive council, to pay to the beneficiary or beneficiaries designated hereon (the said member reserving the power of revocation and substitution of other beneficiaries in accordance with the provisions of the constitution and laws of the order) a mortuary benefit of one thousand dollars, less the amount paid on account of the total and permanent disability benefit," etc.

It is further provided that the certificate is issued "subject to the provisions of the constitution and laws of the order as they existed at the time the said applicant became a member of the order, and as they may be amended from time to time thereafter."

The act of incorporation in the Dominion of Canada, under and by virtue of which the association was created and chartered provides, among other matters, that the purposes of such association shall be:

"A. To unite fraternally all persons entitled to membership under the constitution and laws of the society;

"E. To establish a benefit fund, from which, on satisfactory evidence of the death of a member of the society who has complied with all its lawful requirements, a sum not exceeding \$3,000 shall be paid to the widow, orphans, dependents, or other beneficiary whom the member has designated, or to the personal representative of the member; or from which upon the completion of the expectancy of life of a member, as laid down in said constitution and laws, such shall be paid to himself."

The constitution of the organization provides, among other things:

"The insurance or mortuary benefit of a member shall be paid to the member himself, or to the wife or husband of, or to the affianced wife of, or to the affianced husband of, or to the



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children of, or to the blood relations of, or to persons dependent on the member."

It is manifest that if the right to payment of this mortuary benefit depends upon the relation which subsisted between the member and the person named as a beneficiary at the time of the issuing of the certificate, this money should be paid to Blanche Mahar. And it may here be said that if she is not entitled to such payment, she was not prejudiced by the order of the court fixing Rosie Mahar as the person to whom the money should be paid. This is said because objection was made to some evidence offered in support of the proposition that Rosie Mahar and William Mahar were legally married after the divorce between Blanche Mahar and William Mahar. Since, however, it is a matter of indifference to Blanche Mahar to whom this money should be paid provided she is not entitled to receive it, no prejudice came to her because of any ruling upon evidence in relation to the marriage of Rosie Mahar and William Mahar.

Our attention is called by counsel for the plaintiff in error to a considerable number of cases in which it is held that the person designated as the beneficiary, if entitled to be so designated at the time the certificate is issued, remains such beneficiary, notwithstanding a change of relation thereafter occurring between the parties before the death of the person procuring the issuing of the certificate.

The case of *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457 [24 L. Ed. 251], is such case. The second clause of the syllabus reads:

"A policy of life insurance, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured, unless such be the necessary effect of the provisions of the instrument itself. So held, where, subsequently to effecting an insurance by husband and wife, upon their joint lives, payable to the survivor upon the death of either, they were divorced *a vinculo matrimonii*, and she, having thereafter paid the premiums to the time of his death, brought suit on the policy."

In the opinion of this case, Mr. Justice Bradley, at page 461, uses this language:

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"We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest unless such be the necessary effect of the provisions of the policy itself."

Other cases cited by counsel support this proposition as applied to regular life insurance companies, but it is to be remembered that the company now being considered is governed by the statutes applicable directly to fraternal beneficiary associations.

In *White v. Brotherhood of American Yeomen*, 124 Ia. 293 [99 N. W. 1071; 66 L. R. A. 164; 104 Am. St. 323], a case arose under the provisions of Sec. 1824 of the code of Iowa, and it is said in the second clause of the syllabus:

"The code, Sec. 1824, provides that no fraternal association shall issue any certificate unless the beneficiary be the husband, wife, relative, legal representative, heir or legatee of such member. An association which expressed its object to be a bestowal of financial benefits on the family, widow, heirs, relations and such others as may be permitted by the laws of the state, and constitution and by-laws, and which permitted a change of beneficiary, issued a certificate payable to a certain person by name, such person being the wife of the member when the certificate was issued. Subsequently she was divorced and the member remarried, but made no change of beneficiary. *Held*: That on the death of the member, the first wife was entitled to the proceeds of the certificate."

In the opinion of this case, Judge Sherwin uses this language:

"The statute provides only for the relationship that shall exist when the certificate is issued, and does not in words, or by fair implication, limit payment to those only who occupy such relation at the time of death. It was the evident intent of the legislature to prohibit anything in the nature of gambling contracts, and to so limit the beneficiaries as to accomplish such a result."

And further along in the opinion it is said:

"It is a well recognized rule that a policy of life insurance or a designation of a beneficiary, valid in its inception, remains so although the insurable interest or relationship of the bene-

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fiary has ceased, unless it is otherwise stipulated in the contract." Citing, *Connecticut Mut. L. Ins. Co. v. Schaefer, supra*, and Bacon, Benefit Societies, Sec. 253

Turning to the section referred to in Bacon, we find this:

"The general rule undoubtedly is that a policy of life insurance or a designation of beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract."

In support of this a large number of authorities are cited which sustain the doctrine in the text and as stated in the cases from which quotations have hereinbefore been made.

Bacon then follows in these words:

"Where, however, the beneficiaries of members of benefit societies were, by statute, restricted to the family dependents or relations of their members, and a member of one of such societies designated his wife from whom he afterwards was divorced, it was held that she lost her rights under the designation in consequence of such divorce."

This case will seem to be apparently against the authorities, but the reason given is that under the statute the relationship or status must exist at the time of the maturity of the contract. Especially is this true if the regulating statute specifies certain classes to which payment of benefits shall be made.

Bacon then calls attention to the Iowa case, *White v. Brotherhood of American Yeomen, supra*, and this, as has already been shown, is reasoned by the court upon the proposition that the statute fixes who may be named as beneficiaries, but it does not fix to whom payment shall be made.

The section of our statute, which has already been quoted, expressly provides that the payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage or legal adoption affianced husband or affianced wife, or to a person or persons dependent on the member.

Attention has already been called to the law of the association which provides for payment to be made to parties other than the beneficiary named, where the payment to the beneficiary would be repugnant to the laws of the state or country at

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the time of the death of the member causing the certificate to be issued.

The case of *Supreme Commandery v. Margaret Everding*, 10 Circ. Dec. 419 (20 R. 689), is cited in support of the claim of the plaintiff in error, Blanche Mahar. In that case nothing is said with reference to the statute of Ohio fixing the persons to whom payment should be made. The decision seems based entirely upon the proposition that the person to whom the money was awarded was the wife of the member at the time the certificate was issued, and was therefore a proper person to be named as beneficiary, and then to reach this conclusion because of the cases which hold that a person, properly a beneficiary at the time of the issuing of the certificate, remains such beneficiary so long as no change of beneficiary is made in the certificate. But the cases cited are those where the policies were issued by regular life insurance companies.

That case was decided by a very able bench, consisting of Judges Scribner, Bentley and Haines, and the opinion was prepared by Judge Haines, for whose opinion we have the highest respect, as has the entire bar of the state. However, that case was decided in 1893. A later case, *Brotherhood v. Taylor*, not reported, decided by the circuit court of Ross county in 1906, holds the contrary doctrine. This case was also decided by a very able court, and we felt disposed to follow this rather than the Lucas county case. In that case there had been a divorce between the member on whose account the certificate was issued and the beneficiary designated in the policy, who was his wife at the time the certificate was issued. The third clause of the syllabus in this case reads:

"Under the laws of Ohio, beneficiary certificates are to be construed with reference to the status of the beneficiary at the time of payment (meaning payment of the loss). The words 'Alice B. Taylor' in the certificate are *descriptio personae*, and may be rejected as surplusage, and the certificate is construed to mean that if there be no wife living, the benefits go to the administratrix in trust for his heirs."

In the opinion in this case Judge Jones uses this language:

"In the determination of this case, it may be said at the

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outset that the various rules of law applicable to ordinary life insurance companies do not apply in this case, for the reason that it is provided by statute that such associations shall be exempted from provisions of the insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein."

We reach the conclusion, both from the spirit and purpose of the statutes in relation to these associations, and from the express language of Sec. 9467 G. C., that there was no error in the decision of the court of common pleas, and the judgment is affirmed.

**Winch and Niman, JJ., concur.**

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**MASTER AND SERVANT.**

[Ashtabula Court of Appeals, January 31, 1913.]

**Metcalf, Norris and Pollock, JJ.**

**GUARRINO V. UNION DOCK CO. ET AL.**

**Responsibility as Between Dock Company and Steamship Company  
For Safety of Employees Unloading Vessel.**

Plaintiff, an employee of a dock company, was by the direction of his employer engaged in unloading a steamship belonging to another company. While so engaged he was injured by reason of the unsafe condition of the place where he was working.  
Held:

1. The duty of furnishing a safe place for the plaintiff to work rested on his employer, the dock company, and not on the steamship company.
2. The plaintiff by engaging in the employment, by direction of his employers and without objection on his part of unloading the boat of another company, did not assume the risk of the unsafe condition of the place where he was working.
3. The duty which plaintiff owed to the steamship company was that of ordinary care only.

[Syllabus by the court.]

**ERROR.**

*Anderson & Lamb*, for plaintiff in error.

*H. H. McKeehan*, for defendant in error.

**METCALFE, J.**

The plaintiff in error, Stefano Guarrino, was plaintiff below, and brought this action for damages for injuries occa-

## Ashtabula County Appeals.

sioned by the alleged negligence of the defendants. Upon the trial at the close of the evidence the trial judge, on motion of the Union Dock Co., directed a verdict in its favor. Thereupon the case was submitted to the jury as between the plaintiff and the Interstate Steamship Co. and a verdict was rendered in the favor of the defendant steamship company. The errors here assigned are, first, that the court erred in directing a verdict in favor of the Union Dock Co., and that the court erred in the charge to the jury. The Union Dock Co. is the owner and operator at Ashtabula Harbor of a number of machines used in unloading iron ore from boats. The Interstate Steamship Co. is the owner of a boat known as the B. F. Jones. At the time the plaintiff was injured the B. F. Jones was unloading at the docks of the Union Dock Co., and the machines of the dock company were doing the work of unloading. The men who had charge of the machines and who were doing the work of unloading, including the plaintiff, were in the employ of the Union Dock Co., and not of the Interstate Steamship Co. The hold of the boat where the iron ore is stored consists of several compartments, each of which has a separate hatch. As the machines progressed in the work of unloading it became necessary to move them from one hatch to another, and when they were so moved it was necessary for the workmen who were in the hold of the boat attending to the filling of the hoppers to move to the different hatches as the machines moved. In so doing it was necessary to climb a ladder to the top of the compartment and then travel along a passageway on the side of the boat from one hatch to another. At the time of the accident to the plaintiff the unloading machine upon which the plaintiff was working had been moved from one compartment to another and the plaintiff was going from the one where he had been at work to the one where the machine had been moved. He was going in the usual manner and along the usual route. There was upon the shelf or gangway where the plaintiff was obliged to walk in going from one hatch to another some timbers which are called strong-backs. It was dark in going through the place where these things were left, and the plaintiff, as he came to the top of the ladder and stepped over the side of the hatch onto

**Guarrino v. Union Dock Co.**

the gangway or shelf, as it is called by some, stepped upon one of these timbers and was thrown or knocked to the bottom of the boat, and there received some injuries.

There is evidence in the case tending to show that the gangway where these timbers had been left was not a proper place for them, and clearly it was a question for the jury whether or not there was negligence on the part of the defendant companies, or either of them, in leaving them in that place, and whether or not the plaintiff had been furnished a safe place to work.

The duty of furnishing a safe place for his workmen rests upon the employer, and the fact that the place where the men were working belonged to another company does not excuse the dock company from its duty in that respect in the least, but the fact that the duty of furnishing a safe place in which to work rested upon the dock company, could not in any way excuse the steamship company from the consequences of its negligence in leaving the place where the plaintiff was working unsafe. The plaintiff in engaging in the work of unloading boats assumed no greater and no different risk than he would have assumed if the boat had been owned by the dock company, his employer; consequently he did not assume the risk of the unsafe condition of the boat. It being a question for the jury to determine whether or not the place provided by the defendants for the plaintiff to work was a safe place it was error in the trial judge to direct a verdict in favor of the dock company.

Was the charge erroneous? The part of the charge complained of was as follows:

"The plaintiff is presumed to have assumed the risk of such injuries from accident which were incident to the nature and character of the work in which he was engaged, and against which the defendant could not, in the exercise of ordinary care, have protected him."

And again:

"The plaintiff is not entitled to relief against the defendant for injuries resulting from known and obvious dangers avoidable by the exercise of ordinary care on his part, notwithstanding the defendant may have been negligent. Such injuries, together with such as may have happened, if you so find, with no

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fault on the part of the defendant were assumed by the plaintiff."

The question of assumption of risk is a question between employer and employee. The plaintiff's contract of employment was with the Union Dock Co. and not with the Interstate Steamship Co. He did not assume the risk of any negligence on the part of the steamship company; neither did he assume the risk of the unsafe condition of the place where he was working. We think, therefore, that the charge is erroneous and misleading, and for these reasons judgment is reversed, as to both of the defendants.

Judgment reversed.

Norris and Pollock, JJ., concur.

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**APPEAL—RECEIVERS.**

[Cuyahoga (8th) Circuit Court, February 5, 1912.]

Marvin, Winch and Niman, JJ.

AUGUST BECKER V. CITIZENS REAL ESTATE CO. ET AL.

**Order Disallowing Report of Receiver not Appealable.**

An appeal will not lie to the circuit court from an order of the common pleas court disallowing a partial report of a receiver appointed in a case pending in that court and directing the receiver to file an amended report.

**APPEAL.**

*W. W. Hole*, for plaintiff.

*Stearns, Chamberlain & Royon, Parsons & Fitzgerald and Myers & Green*, for defendant.

**MARVIN, J.**

August Becker brought a suit in the court of common pleas against the Citizens Real Estate Co., a corporation, setting up that he was a creditor of such corporation, and averring other facts, which, if established, would justify the appointment of a receiver to take charge of the property of the corporation, convert it into money and distribute the avails thereof.

Such proceedings were had in this action that Howard A. Byrns was appointed such receiver and as such made a partial report to the court on June 14, 1911.



**Becker v. Real Estate Co.**

On July 6, 1911, F. L. Wenham, one of the creditors of the corporation, filed objections to this report, specifying a large number of items for which the receiver had taken credit to himself in the report, and concluding in these words:

"The said receiver has disbursed the funds of said estate, as shown by his partial report, in the payment of unnecessary expenses. the maintenance of an office in the Citizens Building, including office rent, telephone service. the salary of a stenographer and various other items of expense, which are not properly chargeable to said estate; that said report should not be confirmed, but that the said report should be disallowed and the receiver be ordered to file a correct statement of his transactions."

On October 24, 1911, the court entered its order on this motion in these words:

"The objections of F. L. Wenham to the report of the receiver and motion to disallow same is heard and granted, at the receiver's costs, for which judgment is rendered against him, and said receiver is ordered to file an amended report by November 4, 1911. The amount of the bond for appeal is fixed in the sum of \$200."

The receiver gave his bond for appeal, and did all things necessary to perfect such appeal, provided the order is one from which an appeal may be taken. If this matter is a proper subject of appeal, it is because it comes within the provisions of Sec. 12224 G. C. This section provides that:

"An appeal may be taken to the circuit court by a party, or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist."

We are clearly of the opinion that the order made in this case is not a final order within the meaning of the section quoted above. Nobody's rights are fixed by it. The amount which the receiver is to distribute is not fixed. The amount of credits to which the receiver is entitled is not fixed. Nothing is fixed but that the report as a whole is not approved, and the court orders that a new report shall be filed. It is no more final

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than an order sustaining a demurrer to a petition is final, where leave is given to amend the petition.

To construe this order as determining that no part of the credits objected to will be allowed, is to give it a construction which it clearly was not the intention of the court it should have. Had such been the intention of the court, the order should, and doubtless would have been, that certain items of credit claimed would not be allowed, and having specified such as should be so disallowed, there would have been no occasion to require an additional report to be filed, because the report taken in connection with the order would have shown the amount in the receiver's hands to be thereafter accounted for.

If there were no other reasons for holding that this is not a final order, the foregoing would be sufficient, and would require us to sustain the motion to dismiss this appeal.

The case of *Evans v. Dunn*, 26 Ohio St. 439, relied upon by the appellant does not, as we view it, support his contention. There a final report by a master was filed, stating an account between partners. Exceptions were taken to certain items in the report. The allowance or rejection of these items, or any of them, affected the amount to which each of the parties was entitled. The settlement of this account, the order of the court approving it, disposed of the entire controversy. The court ordered the modification of the report, and as so modified, it was confirmed. This was held to be a final order from which an appeal could have been taken. It was not taken, and therefore the court refused to hear evidence touching the questions settled by the order.

Whether any order made by the court of common pleas, in the settlement of the accounts of a receiver, can be appealed from, need not here be determined. Counsel are familiar with the case of *Scheidler v. Railway*, 1 Circ. Dec. 584 (2 R. 453), where the holding is that the only remedy open to the receiver, who feels aggrieved in such a case, is by proceedings in error. See also *Cincinnati, S. & C. Ry. v. Sloan*, 31 Ohio St. 1.

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Liability of street railway for elimination of grade crossing determinable by jury. *Northern Ohio Trac. & L. Co. v. Akron*, 644.

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